TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISSOURI CONSTITUTION

MISSOURI STATUTES

MISSOURI RULES

FEDERAL STATUTES, RULES, AND REGULATIONS

FEDERAL RULES OF CIVIL PROCEDURE

OTHER STATE STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Relator's request the Court to review Respondent's decision to deny Relator's motion for summary judgment under Rule 74.04 and apply the 6-year statue of limitations set out in § 516.420 RSMo 2000 to the plaintiffs' claims in this case. Although the Court ordinarily should not review by means of a remedial writ a ruling of the type at issue here, since it constitutes a ruling on a question of law and does not amount to an act or decision in excess of jurisdiction, State ex rel. Morasch v. Kimberlain, 654 S.W.2d 889 (Mo. banc 1986), Respondent agrees that review by a writ may be appropriate in this case given the nature of this action as a class action, the number of similar class actions pending before the Missouri courts, and the fact that the Sixteenth Judicial Circuit wrongly decided the limitations defense that Relator raises, first in McLean v. First Horizon Home Loan Corp. (Division 16), and again in Schwartz v. Bann-Cor Mortgage (Division 15). See Mo. Const., art.4, § 4.1; State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861 (Mo. banc 1986).[1]

[1] On March 31, 2003, after this Court issued its writ or prohibition, the circuit court in McLean amended its decision to apply a 3-year statute of limitations and held that the mortgage lender in that case was a "moneyed corporation" and that the plaintiffs' statutory claims were therefore subject to the 6-year statute of limitations in § 516.420 RSMo. (A222-223) The decision in McLean is now consistent with the decisions of the Seventh and Twenty-Second Judicial Circuits in this and the Couch, Gilmor and Turner cases.

STATEMENT OF RELATED CASE

There is another case pending before the Court in which the same or substantially the same issues have been raised, namely, Danita Couch, et al. v. Century Financial, Inc., et al., SC85037. The disposition of that case may affect or control the Court's decision in this case.

INTRODUCTION

The Court should quash its preliminary order of prohibition. This is a lawsuit against a moneylender, Century Financial Group, Inc., and the "secondary market" assignee that purchased, sold and/or profited from the residential second mortgage loans that Century Financial originated and made. Relator is one of many such "secondary market" assignees, having purchased and acquired a number of second mortgage loans that Century Financial made to the homeowners of this state. Relator, through its bank trustees (Bank of New York and Wilmington Trust Company), used the loans, along with numerous others, as collateral to back a series of asset-backed notes that Relator sold to the public. Relator, through Master Financial, its loan servicer, and Bank of New York, then collected the monthly loan payments due on the second mortgage home loans and disbursed the money to its investors.

The above activities define the nature of the businesses in which Century Financial and Relator are singularly engaged. Such activities -- the making, buying and selling of residential loans, the collection and disbursement of loan proceeds, and the use of such loans as collateral to back public notes and securities issued for purposes of investment – also epitomize exactly what it is that a "moneyed corporation" is and does. The businesses

involved in this case are not construction companies or manufacturing firms. They are instead financial concerns: a moneylender and a statutory trust engaged exclusively in the business of lending, selling and profiting from money, and the documents giving rise to an obligation to pay money. Money is the stock in trade of both Century Financial and Relator, not building materials or goods. Both Century Financial and Relator use money to make a money profit. Both Century Financial and Relator are unquestionably "moneyed corporations."

With undisputed facts such as these, Respondent correctly decided that Century Financial and its assignees, including Relator, were "moneyed corporations" and applied the 6-year statute set out in § 516.420 RSMo 2000. As Respondent found on the record before him, "[The] real purpose … the bottom line purpose [of Century Financial and Relator] is to … handle money and handle loans." (SIO-PWP, Ex. 15, at 20-21)[2] Respondent's finding was absolutely correct and that decision should stand. Accordingly, the Court should quash its preliminary order of prohibition and hold that the plaintiffs' claims under the Missouri Second Mortgage Loans Act and § 408.562 RSMo are governed by § 516.420 RSMo, Missouri's 6-year statute of limitations.

Even if it determines that Relator is not a "moneyed corporation" for purposes of § 516.420 RSMo, the Court should still quash its preliminary order of prohibition. So long as the Court determines that Century Financial was a "moneyed corporation," the 6-year

[2] Respondent's Suggestions in Opposition to Petition for Writ of Prohibition are at times referred to as "SIO-PWP."

statute of limitations applicable to the plaintiffs' claims against Century Financial will also apply to Relator. The claims are the same. As a purchaser and holder of the loans that the plaintiffs allege Century Financial made in violation of Missouri law, Relator "stands in the shoes" of Century Financial, and thus, cannot raise a limitations defense different from that which is available to Century Financial. Relator, in other words, is derivatively liable to the plaintiffs for the unlawful loans that Century Financial made pursuant to, among other things, the rule of assignee liability enacted as a part of the Home Ownership and Equity Protection Act ("HOEPA"), which provides in part: "any person who purchases or is otherwise assigned …[a high interest loan] shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the creditor of the mortgage." 15 U.S.C. § 1641(d).

In addition, Respondent submits that, no matter what statute of limitations it decides to apply, the Court should still quash its preliminary order of prohibition and allow the case to proceed for any or all of these reasons:

1. The plaintiffs' claims against Relator were timely commenced because the plaintiffs filed suit against Century Financial.

2. The plaintiffs' claims against Relator were timely commenced because the plaintiffs filed suit against a "defendant class" to which Relator belongs, and thus, the statute of limitations was tolled on June 28, 2000, when the lawsuit was first filed.

3. The plaintiffs' claims against Relator were timely commenced since the plaintiffs' claims against Relator "relate back" to the filing of the lawsuit against Defendant Master Financial, Inc. on June 28, 2000.

4. The plaintiffs' claims against Relator were timely commenced because the SMLA, § 408.233 RSMo, makes it unlawful for any person, firm or corporation to "charge, contract for or receive" the interest and excessive or unauthorized fees and closing costs on which the plaintiffs base their claims. Because the record shows that Relator "received" and in many cases continues to receive interest and/or a portion of the allegedly unlawful origination fees and closing costs as a part of each borrower's monthly mortgage payment, the "receipt" of those funds by Relator each month constitutes a new or continuing violation of the SMLA, which triggers the statute of limitations anew.

Finally, Respondent submits in the alternative that, should the Court conclude that neither Century Financial nor Relator is a "moneyed corporation" and that the 6-year statute of limitations in § 516.420 RSMo does not apply, the Court should nevertheless determine whether the 5-year statute of limitations in § 516.120(2) RSMo, rather than the 3-year statute in § 516.130(2) RSMo, governs the plaintiffs' claims in this case on the grounds that the plaintiffs' claims under the Missouri Second Mortgage Loans Act and § 408.562 RSMo constitute an action to enforce a statutory liability "other than a penalty or forfeiture."

STATEMENT OF FACTS

Relator has omitted from its Statement of Facts a number of facts material to the questions before the Court. As a result, Respondent is compelled to submit its own Statement of Facts:

The Plaintiff Borrowers

1. The named plaintiffs in this case are Missouri homeowners who obtained a second mortgage loan, secured by their homes, from Century Financial, Inc., a California-based mortgage lender. (A23-47, ¶¶1, 6, 46, 51-62)

2. Plaintiffs James and Jill Baker (the "Bakers") obtained their loan from Century Financial on or about November 24, 1997. The loan was for $33,500.00, payable over 15 years at 13.99% interest. In exchange, Century Financial took a second mortgage on the Bakers' home in Independence and charged the Bakers, among other things, a $3,375.00 loan origination fee. (A23-47, ¶¶51-54)

3. Although the annual interest rate for the Bakers loan was 13.99%, the APR was 16.568% (See A23-47, ¶51; A177)

4. The Bakers paid the monthly installments due on their second mortgage loan up until January 2001, when they refinanced. (SIO-PWP, Ex. 2 at BvCF - bak0395, 0608-0610)

5. Plaintiffs Jeffrey and Michelle Cox (the "Coxes") obtained their loan from Century Financial on or about September 30, 1997. The loan was for $48,000.00, payable over 20 years at 15.99% interest. In exchange, Century Financial took a second mortgage on the Coxes home in Gladstone and charged the Coxes, among other things, a $2,500.00 loan origination fee. (A23-47, ¶¶55-58)

6. Although the annual interest rate for the Coxes loan was 15.99%, the APR was 17.941% (See A23-47, ¶55; A181)

7. The Coxes have paid and continue to pay the monthly installments due on

their second mortgage loan. (A23-47, ¶¶50, 58; see SIO-PWP, Ex. 4, at PvCF-cox0259, 0273, 0297, 0657; also A183)

8. Plaintiffs William and Linda Springer (the "Springers") obtained their loan from Century Financial on or about October 8, 1997. The loan was for $29,200.00, payable over 20 years at 13.99% interest. In exchange, Century Financial took a second mortgage on the Springers' home in Oak Grove and charged the Springers, among other things, a $3,500.00 loan origination fee. (A23-47, ¶¶59-62)

9. Although the annual interest rate for the Springer loan was 13.99%, the APR was 16.648% (A23-47, ¶59; SIO-WP, Ex. 3, at BvCV-spr0199)

10. The Springers have paid and continue to pay the monthly installments due on their second mortgage loan. (A23-47, ¶¶60, 62; see SIO-PWP, Ex. 3, at BvCV-spr0213, 0215, 0224, 0235, 0242)

11. The origination fees and closing costs on which the named plaintiffs' base their claims were incurred at the time the loans were made and became a part of the principal loan amounts. (A23-47, ¶49-50, 54, 58, 62) The origination fees and closing costs were identified as a part of the "prepaid finance charges" on the named plaintiffs' loan documents. (A176, 180, 186)

Defendant Century Financial Group, Inc.

12. Defendant Century Financial Group, Inc. made each of the residential second mortgage loans at issue in this case. (A23-47, ¶¶1-2, 43, 46-83)

13. It appears that from approximately September 1996 through September 1999, Century Financial operated as a HUD-approved lender and that, although subject to

regulation by the Missouri Division of Finance, Century financial was exempt from state licensing requirements as a "mortgage banker" pursuant to Chapter 443 RSMo (A194-197); see 65 Fed. Reg. 7036, 7037 (February 11, 2000) (reflecting termination of HUD status) (A196-197)

14. Century Financial was in the business of making second mortgage home loans. Century Financial loaned money to the named plaintiffs and no fewer than 555 other Missouri homeowners in exchange for certain fees and a second mortgage interest in the residential Missouri real estate they owned. (SIO-PWP, Ex. 6, A23-47, ¶¶1-2, 43, 46-62) The other Missouri loans violated the SMLA in the same way that the named plaintiffs' loans violated the SMLA. (A23-47, ¶¶ 64-83; see SIO-PFW, Ex. 6) Relator did not put forth any facts to show that Century Financial was not a "moneyed corporation" in support of its motion for summary judgment. (A60-63, 75-87) Relator only argued that it was not a "moneyed corporation." (Id. at A61, ¶5, A78-80)

15. After making each of the residential second mortgage loans at issue in this case in violation of the SMLA, Century Financial sold and assigned the loans to one of several different entities on a "secondary market." (A23-47, ¶¶39, 41, 44, 63-91; A155-171; SIO-PWP, Ex. 10) Relator is but one of these "secondary market" assignees that purchased unlawful loans made by Century Financial. (Id.; Petition for Writ of Prohibition, ¶¶1-2)

Relator

16. Relator purchased and holds several of the approximately 131 residential second mortgage loans that Century Financial made to the plaintiff class, including the

named plaintiffs' loans, which Relator purchased and/or acquired in February 1998. (SIO-PWP, Ex. 5, at 5-21; A116, 153)

17. Relator is a business or "statutory" trust, organized and existing pursuant to Delaware statutory law, namely 12 Del. C. §§ 3801 et seq. (A61, at ¶4; A98, at ¶4)

18. Relator is subject to U.S. Department of Treasury Regulations and, under its operative trust agreements, Relator has the power, among other things, to: (a) purchase, acquire, hold and collect principal and interest on the Home Loans and other assets of the Trust and the proceeds therefrom; (b) issue certain notes, certificates and other instruments representing the beneficial interests in the "Trust Estate" (i.e., "Securities" and the "Residual Interest"); (c) make payments on the Securities and in respect of the Residual Interest; (d) purchase the "Initial Home Loans" having an aggregate principal balance of approximately $239,267,045 pursuant to a Sale and Servicing Agreement dated as of February 1, 1998; and (e) purchase Subsequent Home Loans from a "Pre-Funding Account." (A117, at ¶9; A159-171 at S-15 - S-18; SIO-PWP, Ex. 26-28)

19. Relator, through its bank trustees, Bank of New York and Wilmington Trust Company used the residential second mortgage loans that Relator purchased on the secondary market as collateral for a series of asset-backed securities that Relator and its trustees sold to the public. (A69-74, 191; also SIO-PFW, Ex.'s 5, 26-28)

20. The existence of this "secondary market" and the capital that Relator and the other market participants provided to Century Financial, by agreeing to repurchase the loans that it originated, enabled Century Financial and other similar lenders to make the second mortgage home loans in the first place. (see A23-47 ¶¶ 39, 44, 78, 84-91; S. Rep. No. 169,

103d Cong., 2d Sess. 5 (1994) *reprinted in* 1994 U.S.C.C.A.N. 1881, 1912; SIO-PWP, Ex. 5, 26-28).

21. After acquiring the loans, Relator, through Master Financial, its loan servicing agent, and its trustees, Wilmington Trust Company and Bank of New York, collected the monthly loan payments due on the subject second mortgage home loans and disbursed the money to their investors. (A183-184; also SIO-PFW, Ex. 2, at BvCV-bak0015, 0077, 0392, 0395; Ex. 3, BvCF-spr0215, 0224, 0235, 0242; Ex. 4, BvCF-cox 0259, 0273, 0297, 0657; Ex. 5, 26, 27, 28)

22. Since acquiring the named plaintiffs' loans, Relator has "received" payments of interest from the named plaintiffs, as well as a portion of the pre-paid origination fees and closing costs that were financed as a part of the principal loan amounts. (A23-47, ¶¶1-2, 39, 41, 44, 71, 73-83, 84-91; also SIO-PFW: Ex. 2, at BvCV-bak0015, 0077, 0392, 0395; Ex. 3, BvCF-spr0215, 0224, 0235, 0242; Ex. 4, BvCF-cox 0259, 0273, 0297, 0657)

The Claims to Enforce a Statutory Liability

23. The plaintiffs allege that their loans from Century Financial violated Missouri law, specifically the Missouri Second Mortgage Loans Act, §§ 408.231, et seq. RSMo. (the "SMLA") because the plaintiffs were charged and paid excessive "loan origination" fees and/or certain other closing costs and fees that the SMLA, § 408.233 RSMo, prohibits any person, firm or corporation from "directly or indirectly charg[ing], contract[ing] for or receiv[ing] in connection with any second mortgage loan." (A23-47, ¶¶46-50, 73-83 (quoting § 408.233.1 RSMo))

24. The plaintiffs, individually and on behalf of all other similarly situated and

similarly aggrieved Missouri homeowners, sued (1) Century Financial, as the lender and maker of all the second mortgage loans at issue; (2) the assignees of Century Financial, including Relator, which voluntarily purchased and acquired the unlawful second mortgage loans from Century Financial or an intervening assignee; and (3) the trustees of any such "trust-assignees" like Relator which acquired the loans (e.g., Wilmington Trust Company, the bank trustees of Relator and U.S. Bank National Association). (A23-47, ¶¶1-2. 39, 41, 46-50, 64-83)

25. The plaintiffs' claims against Century Financial and its assignees, including Relator, are premised on the violation of the SMLA and are brought pursuant to the SMLA and Missouri law, specifically §§ 408.233.1, 408.236, 408.562 RSMo. 2000. (A23-47, ¶¶64-83)

26. The plaintiffs seek to recover for themselves and for the plaintiff class they represent all of the allegedly excessive and/or unauthorized origination fees, closing costs and interest that they were charged, contracted to pay and paid, a forfeiture of or an order barring any interest not yet due, punitive damages and reasonable attorneys' fees. (Id., ¶¶64-72; prayer for relief)

Allegations of Assignee Liability

27. The plaintiffs allege that Relator and the other members of the Defendant Class are the assignees of the unlawful loans made by Century Financial and that, as "the purchasers and/or assignees and holders of … the notes and deeds of trust given under the [subject loans],"

> [Relators and the other] ASSIGNEE DEFENDANTS (individually, and as a defendant class, …) are liable to PLAINTIFFS and THE [PLAINTIFF CLASS], just as CENTURY FINANCIAL is liable to PLAINTIFFS and THE SECOND MORTGAGE CLASS.

(A23-47, ¶78)

28. The prospectus for Relator disclosed that Relator was buying "High Cost Loans" and that "[p]urchasers or assignees of any High Cost Loan, including the Trust, could be liable for all claims and subject to all defenses arising under such provisions that the borrower could assert against the originator thereof." (Ex. C, S-11)

29. The prospectus for Relator also disclosed that the High Cost Loans were consumer loans and that the consumer protection laws of different states would apply. One of the consumer protection warnings for Trust 1998-1 read as follows:

> CONSUMER PROTECTION LAWS MAY AFFECT LOANS
>
> Applicable state laws generally regulate interest rates and other charges and require certain disclosures. In addition, other state laws, public policy and general principles of equity relating to the protection of consumers, unfair and deceptive practices and debt collection practices may apply to the origination, servicing and collection of the Loans. Depending on the provisions of the applicable law and the specific facts and circumstances involved, violations of these laws, policies and principles may limit the ability of the Servicer to collect all or part of the principal of or interest on the Loans, may entitle the borrower to a refund of amounts previously paid

and, in addition, could subject the owner of the Loan to damages and administrative enforcement.

(A191-193)

30. The following written notice accompanied the loans papers that Relator received with the named plaintiffs' loans:

NOTICE RE:

SECTION 32 OF THE FEDERAL TRUTH IN LENDING ACT

This is a mortgage subject to special rules under Section 32 of the federal Truth in Lending Act. Purchasers or assignees of this mortgage could be liable for all claims and defenses with respect to the mortgage that the borrower could assert against the creditor.

(A178, 182, 188) (emphasis added)

The California Lawsuit

31. On January 18, 2000, Master Financial, Inc. sued Century Financial in a California state court. In its complaint, Master Financial sought, among other things, indemnification from Century Financial for the no less than 180 of the same Missouri loans that are the subject of this lawsuit -- including each of the named Plaintiffs' loans. (SIO-PWP, Ex. 1)

32. Master Financial alleged and admited in its California complaint that all of the loans for which it seeks indemnity were "second mortgage loans," subject to the SMLA, and that Century Financial "violated" the SMLA when it made the loans. (SIO-PWP, Ex. 1,

at ¶¶7-13) Master Financial further alleged and effectively admitted in the prior California lawsuit that it is liable for such statutory violations as the purchaser or assignee of what it called the "BAD LOANS." (Id.)

Procedural History of this Case

33. The Bakers originally commenced this lawsuit on June 28, 2000 against Century Financial and Master Financial, Inc., approximately six (6) months after Master Financial had sued Century Financial in California for the "BAD LOANS." (A1, 60, at ¶1, A98, at ¶1; SIO-PWP, Ex. 1)

34. The Bakers filed the lawsuit as both a plaintiffs and defendants class action. The Bakers filed suit both individually and on behalf of a class of putative plaintiffs to whom Century Financial had made a residential second mortgage loans in violation of the SMLA. (SIO-PWP, Ex. 7) In addition, Plaintiffs named Master Financial in their original petition both individually and as representatives of a "class" of trust and trustee defendants that had purchased and held the allegedly unlawful Missouri loans that Century Financial made. (Id., ¶¶4, 44)

35. Between July 2000 and August 2001, the defendants removed the case to federal court two (2) times. Each time, the federal court remanded the case to Clay County. (A1-5)

36. On July 11, 2001 Plaintiffs filed a First Amended Petition specifically naming Relator as a defendant, together with a number of other business entities deemed to be the holders and assignees of the unlawful loans that Century Financial made during the relevant period. (A61, at ¶2; A98, at ¶2; Relator's App. Ex. 1 at ¶13)

37. On November 15, 2002, Relator filed their motion for summary judgment pursuant to Mo. Rule 74.04. (A60-96)

38. On December 17, 2002, the plaintiffs filed their Response to Relator's summary judgment motion. (A97-174) In their response, the plaintiffs denied a number of Relator's factual contentions (A 98-100), including the contention that Relator was not a "moneyed corporation." (A100, at ¶¶16-19; A109, at 13 n.4, ¶4) The plaintiffs also identified a number of facts that precluded the entry of summary judgment (A100-102, ¶¶16-27). Relator did not offer any evidence to refute the conclusion that Century Financial was a "moneyed corporation." (A60-62, ¶¶1-15; A100, at ¶¶16-19; A104-105)

39. On December 11, 2002, Respondent entered an Order certifying a Class of claimant-borrowers in a second mortgage case similar to this one in Couch v. Century Financial, Inc. (SIO-PWP, Ex. 19) Respondent concluded that the mortgage lender in that case was a "moneyed corporation" for purposes of § 516.420 RSMo and limited the definition of the plaintiff class to a corresponding period of 6 years. (Id.)

40. On December 19, 2002, Respondent denied Relator's motion for summary judgment, concluding that both the mortgage lender and the statutory trust that acquired the named plaintiffs' second mortgage loans were "moneyed corporations" for purposes of § 516.420 RSMo and confirming that the 6-year statue of limitations applied in this case. (SIO-PWP, Ex. 14-15)[3]

[3]Section 516.420 RSMo 2000 provides:

"None of the provisions of sections 516.380 to 516.420 shall apply to suits against

41. On January 2, 2003, Respondent entered an Order certifying a Class of claimant-borrowers in this case, concluding that Century Financial was a "moneyed corporation" for purposes of § 516.420 RSMo and limited the definition of the plaintiff class to a corresponding period of 6 years. (SIO-PWP, Ex. 16)

42. On January 2, 2003, Respondent entered another Order certifying a Class of claimant-borrowers in a second mortgage case similar to this one, Gilmor v. Preferred Credit Corporation. (SIO-PWP, Ex. 20) Respondent concluded that the mortgage lender in that case was a "moneyed corporation" for purposes of § 516.420 RSMo and limited the definition of the plaintiff class to a corresponding period of 6 years. (Id.)

Other Decisions on the Limitations Issue

43. To date, no less than three Missouri circuit courts have addressed the limitations issue that this case presents; and courts in all three circuit courts have concluded that that the 6-year statute in § 516.420 RSMo rather than the 3-year statute in § 516.130(2) applies to statutory claims like those which the plaintiffs are asserting under the SMLA and § 408.562 RSMo. (SIO-PWP, Ex. 14-18, 19, 20, 21; A222-223)

44. Although as Relator notes, Judge Marco Roldan, 16th Judicial Circuit

---

moneyed corporations or against the directors or stockholders thereof, to recover any penalty or forfeiture imposed, or to enforce any liability created by the act of incorporation or any other law; but all such suits shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created."

(Jackson County), initially applied a 3-year statute of limitations in McLean v. First Horizon Home Loan Corp., No. 00CV228530, Judge Roldan later amended that decision and ruled on March 31, 2003 that the mortgage lender in McLean is a "moneyed corporation" and that the 6-year statute of limitations set out in § 516.420 RSMo governs the plaintiffs' claims. (A222-223)

45. In addition, Judge Timothy J. Wilson, 22nd Judicial Circuit (St. Louis City), in Turner v. Ditech Funding Corp., No. 012-1314, has concluded that the mortgage lender in that case is a "moneyed corporation" and that the 6-year statute of limitations in § 516.420 governs the plaintiffs' claims. (SIO-PWP, Ex. 21)

46. Most recently, Judge Preston Dean, 16th Judicial Circuit (Jackson County), ruled on April 8, 2003 in Schwartz v. Bann-Cor Mortgage, No. 00CV226639-01, that the mortgage lender in that case is not a "moneyed corporation" and that the plaintiffs' claims under the SMLA and § 408.562 RSMo are governed by the 3-year statute of limitations in § 516.130(2) RSMo. (224-226)

POINTS RELIED ON

I.

THE COURT SHOULD QUASH ITS PRELIMINARY ORDER OF PROHIBITION AND HOLD THAT RESPONDENT CORRECTLY DENIED RELATOR'S MOTION FOR SUMMARY JUDGMENT BECAUSE RELATOR DID NOT SHOW THAT THE FACTS MATERIAL TO ITS LIMITATIONS DEFENSE WERE UNDISPUTED AND/OR THAT RELATOR WAS ENTITLED TO A JUDGMENT AS A MATTER OF LAW IN THAT THE RECORD SHOWED THAT THE 6-YEAR STATUTE OF LIMITATIONS SET OUT IN § 516.420 RSMO GOVERNS PLAINTIFFS' STATUTORY CLAIMS TO "ENFORCE A LIABILITY" AND/OR TO RECOVER A "PENALTY OR FORFEITURE" UNDER THE SMLA AND § 408.562 RSMO AGAINST AND FROM CENTURY FINANCIAL GROUP, INC., A "MONEYED CORPORATION," AND THE ASSIGNEES OF CENTURY FINANCIAL, INCLUDING RELATOR, WHICH IS ALSO A "MONEYED CORPORATION" FOR PURPOSES OF § 516.420 RSMO 2000

- **Fielder v. Credit Acceptance Corporation, 19 F.Supp.2d 966 (W.D. Mo. 1998)**
- **Division of Labor Standards v. Walton Construction Management Co., Inc., 984 S.W.2d 152 (Mo. App. WD 1998)**
- **§ 516.420 RSMo (2000)**

II.

THE WRIT OF PROHIBITION MUST BE QUASHED BECAUSE UNDER EITHER A SIX-YEAR OR THREE-YEAR STATUTE OF LIMITATIONS, PLAINTIFFS' CLAIMS ARE TIMELY IN THAT: (A) COMMENCEMENT OF SUIT AGAINST CENTURY FINANCIAL IN LESS THAN THREE YEARS FROM THE DATE OF THE NAMED PLAINTIFFS' LOANS MAKES SUIT TIMELY AGAINST RELATOR AND ALL OTHER ASSIGNEE DEFENDANTS REGARDLESS OF WHAT LIMITATIONS PERIOD OR ACCRUAL DATE IS APPLIED; (B) COMMENCEMENT OF SUIT ON JUNE 28, 2000 AGAINST A DEFENDANT CLASS TOLLED CLAIMS AGAINST ANY MEMBER OF THAT CLASS, INCLUDING RELATOR; (C) BRINGING RELATOR INTO THE SUIT ON JULY 12, 2001 RELATES BACK TO THE ORIGINAL FILING OF SUIT AGAINST DEFENDANT MASTER FINANCIAL; AND (D) THE SMLA MAKES IT ILLEGAL TO HAVE "DIRECTLY OR INDIRECTLY CHARGED, CONTRACTED FOR OR RECEIVED" ANY ILLEGAL FEES AND SO THE LIMITATIONS PERIOD RUNS FROM THE LAST TIME A BORROWER IS CHARGED OR THE NOTE HOLDER RECEIVES ILLEGAL FEES AND/OR INTEREST AND RELATOR RECEIVED PAYMENT FROM THE NAMED PLAINTIFFS WITHIN THREE YEARS OF THE COMMENCMENT OF SUIT AGAINST RELATOR.

- **Johnson Development Co. v. First National Bank of St. Louis, 999 S.W.2d 314 (Mo. App. ED 1985)**

- **Davis v. Laclede Gas Co., 603 S.W.2d 554 (Mo. banc 1980)**
- **Appleton Electric Co. v. Graves Truck Line, Inc., 635 F.2d 603 (7th Cir. 1980)**

III.

IN THE ABSENCE OF § 516.420, THE PROPER STATUTE OF LIMITATIONS WOULD NOT BE THE 3-YEAR PERIOD UNDER § 516.130 BUT THE FIVE-YEAR PERIOD UNDER § 516.120(2) BECAUSE IF THE REMEDIES AVAILABLE UNDER THE SMLA ARE NOT PENALTIES OR FORFEITURES BUT ARE REMEDIAL, AS RELATORS HAVE CONTENDED, THEN THE STATUTE IS REMEDIAL AND § 516.120(2) APPLIES.

- **§ 516.420 RSMo 2000**
- **§ 516.120(2) RSMo 2000**
- **34 Mo. Prac. Personal Injury and Tort Handbook § 29.5 (2002 ed.)**

ARGUMENT

The Court should dissolve its preliminary writ of prohibition and allow this case to proceed because:

I.

THE COURT SHOULD QUASH ITS PRELIMINARY ORDER OF PROHIBITION AND HOLD THAT RESPONDENT CORRECTLY DENIED RELATOR'S MOTION FOR SUMMARY JUDGMENT BECAUSE RELATOR DID NOT SHOW THAT THE FACTS MATERIAL TO ITS LIMITATIONS DEFENSE WERE UNDISPUTED AND/OR THAT RELATOR WAS ENTITLED TO A JUDGMENT AS A MATTER OF LAW IN THAT THE RECORD SHOWED THAT THE 6-YEAR STATUTE OF LIMITATIONS SET OUT IN § 516.420 RSMO GOVERNS PLAINTIFFS' STATUTORY CLAIMS TO "ENFORCE A LIABILITY" AND/OR TO RECOVER A "PENALTY OR FORFEITURE" UNDER THE SMLA AND § 408.562 RSMO AGAINST AND FROM CENTURY FINANCIAL GROUP, INC., A "MONEYED CORPORATION," AND THE ASSIGNEES OF CENTURY FINANCIAL, INCLUDING RELATOR, WHICH IS ALSO "MONEYED CORPORATION" FOR PURPOSES OF § 516.420 RSMO 2000

A. STANDARD OF REVIEW

Relator is requesting the Court to review Respondent's decision to deny Relator's motion for summary judgment. Consequently, the Court reviews the record *de novo* and applies the same criteria to be used by the trial court. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The moving

party bears the burden of showing its right to summary judgment. Id.; Rule 74.04. Therefore, Relator, as the movant below, had to show: (1) that there was no genuine dispute of fact material to its limitations defense and (2) that Relator was entitled to judgment as a matter of law. Id. Only when the movant meets its burden under Rule 74.04(c) and establishes a prima facie case for summary judgment does the burden shift to the non-movant to show that the movant was not entitled to summary judgment as a matter of law. Hale v. City of Jefferson, 6 S.W.3d 187, 193 (Mo. App. WD 1999); City of Bridgeton v. Northwest Chrysler-Plymouth, Inc., 37 S.W.3d 867, 876 (Mo. App. ED 2001). "It is only when the moving party establishes a prima facie right to judgment that the burden shifts to the non-moving party under Rule 74.04(e)." Dresser Industries, Inc. v. Lane, 878 S.W.2d 869, 870 (Mo. App. ED 1994) (burden did not shift since movant's evidence was not conclusive).

In determining whether Relator met its burden, the Court must review the record in the light most favorable to the plaintiffs (as the parties against whom judgment was entered). ITT,854 S.W.2d at 376. The Court must also afford the plaintiffs the benefit of all reasonable inferences. Id.

Finally, although the issue over which of two or more statutes of limitations applies in a case is a ordinarily a question of law to be reviewed on appeal *de novo*, a limitations defense may turn on the facts. See Business Men's Assurance Co. of America v. Graham, 984 S.W.2d 501 (Mo. banc 1999). The standard of review will be important if the Court determines that the record does not support Respondent's conclusions as a matter of law, but that Respondent's decision to deny Relator' motion was nevertheless appropriate given

the absence of any significant "merits" discovery on the issue of whether Century Financial and/or Relator, itself, were or are in fact "moneyed corporations" for purposes of § 516.420 RSMo.

B. RESPONDENT CORRECTLY DENIED RELATOR'S MOTION FOR SUMMARY JUDGMENT SINCE THE RECORD SHOWED THAT THE 6-YEAR STATUTE OF LIMITATIONS SET OUT IN § 516.420 RSMO GOVERNS PLAINTIFFS' STATUTORY CLAIMS AGAINST CENTURY FINANCIAL AND RELATOR

Respondent correctly denied Relator's summary judgment motion. Relator simply did not come forward with any evidence from which Respondent could conclude that Century Financial was anything other than a "moneyed corporation" within the meaning of § 516.420 RSMo 2000. Nor did Relator present sufficient facts to show that it was not a "moneyed corporation" or, even if it isn't, that Relator, as the admitted assignee and holder of the unlawful loans, can raise a limitations defense different from that available to Century Financial. If anything, the record shows that both Century Financial and Relator is a "moneyed corporation," as a matter of law or, at the very least, that a reasonable jury could likely conclude as much at trial.

1. Century Financial was a "Moneyed Corporation" within the Meaning of § 516.420 RSMo as a Matter of Law

Relator half-heartedly argues that Century Financial was not a "moneyed corporation." (Brief of Relator at 36-37) Relator's lack of zeal is understandable since the evidence here overwhelmingly shows that Century Financial was a "moneyed corporation" for purposes § 516.420 RSMo 2000. Moreover, Relator failed to offer any evidence in support of its motion to negate the fact that Century Financial was a "moneyed

corporation." (SOF, ¶14; SIOW-PWP, Ex. 14 at 17-18) Since that particular issue is dispositive, Relator's failure to satisfy its burden on summary judgment is itself grounds for Respondent's decision.

a. Century Financial was a "Moneyed Corporation"

The allegations and evidence are more than sufficient to establish the fact that Century Financial is a "moneyed corporation" for purposes § 516.420 RSMo 2000. The record is clear: Century Financial was a moneylender, lending money to consumers throughout the country. (SOF, ¶¶1-15) Lending money and then selling and profiting from its loans of money was what Century Financial did. Century Financial had the power to make loans and lend money, and it did in fact make loans and lend money to each of the named plaintiffs and the no fewer than 555 other Missouri homeowners who are now members of the certified plaintiff class. (Id.) All of the loans were secured by Missouri real estate. In each instance, Century Financial turned around and sold the loans on a "secondary market" -- comprised of entities like Relator, which purchased the loans and revenue streams for purposes of investment, and solely for the sake of making a profit. (Id., ¶¶12-22)

Such activities -- the making, buying, pooling and selling of residential loans at a profit, epitomize what it is that a "moneyed corporation" is and does. Century Financial is not a construction company or manufacturing concern. Century Financial is a financial business that deals exclusively in money and the paper that gives rise to a recurring obligation to pay money. Century Financial is a lender of money and certainly exercises "banking powers." Century Financial "lends" money to homeowners in exchange for

fees and costs and an interest in collateral. Century Financial competes with banks, must comply with the banking laws, and, also like a bank, markets and discounts the loans it originates to investors like Relator, which use the loans and money-streams they generate for investment and profit. With factual allegations and inferences like these, Respondent could readily conclude as he did that Century Financial was in fact (or certainly could be deemed to be on facts not yet developed) a "moneyed corporation" for purposes of § 516.420 RSMo.

b. A Mortgage Lender is a "Moneyed Corporation"

Respondent's conclusion is correct. In Division of Labor Standards v. Walton Construction Management Co., Inc., 984 S.W.2d 152 (Mo. App. WD 1998), the court of appeals held that the term "moneyed corporation" as used in § 516.420 RSMo means "a corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurance." Id. at 156 (emphasis added). As this definition makes clear, a business association need not actually be a bank or insurance company to be a "moneyed corporation." The term is much broader than that and unquestionably includes mortgage lenders like Century Financial. See, e.g., Fielder v. Credit Acceptance Corporation, 19 F.Supp.2d 966 (W.D. Mo. 1998), vacated in part on other grounds, 188 F.3d 1031 (8th Cir. 1999) (non-bank auto finance company that financed purchase and sale of used automobiles and charged and obtained finance charges and interest in conjunction such agreements was "moneyed corporation" for purpose of 6-year statute); Hobbs v. National Bank of Commerce of Kansas City, Mo., 101 F. 75 (2nd Cir. 1900) (term "moneyed corporation" included mortgage company that sold bonds secured by

mortgages); Marble Mortgage Co. v. Franchise Tax Board, 241 Cal.App.2d 26, 50 Cal. Rptr. 345 (1966) (corporation engaged in the purchase and assignment of first deeds of trust was "financial [moneyed] corporation");[4] Morris v. Essex Investment Co. v. Director of Division of Taxation, 161 A.2d 491 (N.J. 1960) (second mortgage lender was "financial business" subject to taxation as a bank); Grice v Anderson, 96 S.E. 222 (S.C. 1918) (business formed to "'buy, sell, mortgage and improve real estate, deal in negotiable paper, bonds, stocks and all other securities'" was "moneyed corporation"); Fletcher Cyc. Corp. 375 (Perm Ed) ("'moneyed corporations' has been defined to mean those businesses engaging in activities that involve dealing in money or financing"). If an auto-finance company is a "moneyed corporation" for purposes of § 516.420 RSMo, a mortgage lender

[4] In Marble Mortgage Co. v. Franchise Tax Board, the court held that a California company "engaged in the business of initiating loans secured by first deeds of trust … with the intention of assigning them to various institutional investors, a business commonly referred to as 'mortgage bankers' or 'loan correspondents'" was a "financial" (or moneyed) corporation for purposes of the California franchise tax. 241 Cal.App.2d at 29, 50 Cal.Rptr. at 347. In reaching its decision, the court found compelling the fact that the loans Marble Mortgage made "were primarily on single family homes of the same nature as real estate loans made by banks, …" Id.; also see Morris Plan Co. of San Francisco v. Johnson, 37 Cal.App.2d 621, 624, 100 P.2d 493, 495 (1940) words "'financial corporation,'… designate and include moneyed corporations performing some of the functions of a national bank").

like Century Financial, which makes and sells mortgage loans, must surely be a "moneyed corporation" too.[5]

The "definition" of "moneyed corporation" that the court of appeals set forth in the Walton case came from New York, the state from which the court in Walton Construction concluded that § 516.420 RSMo (originally enacted in 1865) was likely borrowed. 984 S.W.2d at 155. At the time the Missouri legislature enacted what is now § 516.420, the statutes of New York defined the term "moneyed corporation" as "a corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurance." Id. (citing 1 N.Y. rev. Stat. 598, § 1 and Mutual Ins. Co. of Buffalo v. Board of Supervisors of Erie County, 4 N.Y. 442 (1851)). (A319-20) Such expansive language was not unintentional.

Banks and insurance companies were only two types of corporations deemed to be "moneyed corporations" under New York law. See Mutual Ins., 4 N.Y. at 444. There were (and are still today) a host of others, including any "trust, loan, mortgage security, guaranty or indemnity company or association, and every corporation or association having the power and receiving money on deposit." See N.Y. Rev. Stat., vol. II, L. 1874, ch. 324 (A331-334); Hobbs, 101 F. at 76 (New York banking law expressly includes banks, savings banks, trust companies, building and mutual loan corporations, co-operative loan

[5] Neither in Fielder nor in Hobbs did the court state that the conclusion it reached was dependent on the fact that the "moneyed corporation" before it could make "loans on pledges or deposits."

associations, mortgage loan or investment corporations, and safe-deposit companies); N.Y. Code of Civil Procedure § 394 (A318-319) (applicable to "moneyed corporations or banking associations"). In construing the term "moneyed corporation" as used in § 516.420, recourse to New York law is appropriate. Walton, 984 S.W.2d at 155. Accordingly, the Court should find that because a mortgage lender was (and still is) considered a "moneyed corporation" under New York law, Respondent's conclusion that Century Financial was "moneyed corporation" is correct.

Interestingly, Relator cites to New York General Construction Law, § 66(a), subdiv. 6, which today defines a "moneyed corporation" as "a corporation to which the banking law or the insurance law is made applicable by the provision of such laws." (Brief of Relator at 29; Compare N.Y. Rev. Stat., vol. II, § 51[A330]) Relator's argument is fatal to their point. A mortgage lender like Century Financial is in fact "subject to [New York] Banking Law." See New York Banking Law, § 6-i; id; Article 12-D, §§ 589, 590, 590-a (regulations applicable to entities originating, funding and servicing residential mortgage loans and identifying those activities as a "banking function") (A3014-318); cf. New York Business Corporate Law § 301(a) (the name of a corporation shall not contain the words "finance," "loan," "mortgage" absent approval of the "superintendent of banks or the superintendent of insurance" (A319-20).[6] The same is true in Missouri.

[6] Relator's reliance on Retailers Collateral Security Trading Corp. v. State of New York, 176 N.Y.S.2d 429 (App. Div. 1958) is misleading. The court in that case held that a "sales finance company" was not a "moneyed corporation" because the New York

All entities and persons that "engage in the business of brokering, funding, originating, servicing or purchasing of residential mortgage loans" in Missouri are subject to Chapter 443 of the Missouri Revised Statutes. See § 443.805.1 RSMo 2000; §§ 443.800 to 443.893 RSMo 2000. Although a mortgage lender/banker like Century Financial may be exempted from the state licensing provisions if they fall within an exemption set forth in § 443.803.1(8) RSMo, § 443.801.3(8)(j) RSMo 2000 (see A194-195), the license exemption only applies if the lender remains subject as in to federal banking laws. See § 443.801.1(19) RSMo, which provides:

> a mortgage loan company which is subject to licensing, supervision, or annual audit requirements by the Federal National Mortgage Association (FNMA), or the Federal Home Loan Mortgage Corporation (FHLMC), or the United States Veterans Administration (VA), or the United States Department of Housing and Urban Development (HUD), or a successor of any of the foregoing agencies or entities, as an approved lender, loan correspondent, seller, or servicer

§ 443.801.1(19) RSMo 2000.

During the time that it was engaged in lending operations in Missouri, Century Financial was a "mortgage banker" subject to regulation by the Missouri Division of

---

legislature enacted a statute which expressly said that "sales finance companies" (unlike mortgage bankers) are not "moneyed corporations." Id. (citing Banking Law § 500 [repeated eff. Sept. 1, 1964]).

Finance. (SOF, ¶13; A194-95) By law, the Division of Finance has "charge" of the laws "relating to banks, trust companies, and the banking businesses of the state." § 361.020.1 RSMo 2000. Century Financial was also apparently exempt from state licensing requirements since it was instead subject to the licensing, supervision, and annual audit requirements of the United States Department of Housing and Urban Development (HUD). (SOF ¶10) As a result, Century Financial unquestionably falls within the definition set forth by the court in the Walton case. Century Financial is subject to regulation by the Missouri Division of Finance; and the Division ensured that, to avoid licensing within the state, comparable federal regulation would still apply. That is what occurred here. Century Financial was subject to federal "banking law." The National Housing Act, 12 U.S.C. §§ 1701, et seq. is found in Chapter 13 of Title 12 of the United States Code, governing "Banks and Banking." In addition, the operation of mortgage lenders is governed by various chapters of the federal banking law, with which Century Financial had to comply (as is shown by the loan papers): Title 12 of the United States Code including, among other things, Chapters 27 (Real Estate Settlement Procedures Act), 29 (mortgage disclosures), 38 and 38A (mortgage foreclosures), and 49 (Homeowners' Protection Act of 1998). Beyond any doubt Century Financial was a "moneyed corporation" for purposes of § 516.420 RSMo.

i. The Power to Loan Money

Relator argue that, even though its business was making and selling loans secured by real estate, Century Financial cannot be deemed to be a "moneyed corporation" because every Missouri corporation has the power to loan money secured by real estate. (Brief of

Relator at 22-23) Relator either misses or has subtly misconstrued the point. It is not what Century Financial could do that makes it a "moneyed corporation." It is what Century Financial did do. Century Financial is not a "moneyed corporation" because it has "the power" under Missouri law to loan money secured by real estate, like every other corporation. Century Financial is a "moneyed corporation" because lending money secured by real estate is the *sine qua non* of its existence. The business of Century Financial is lending money. Century Financial is a moneylender which, in competition with and just like a bank, made and sold residential mortgage loans subject to banking laws. Certainly, Century Financial is more like a bank than any other type of business. A mortgage lender need not have each and every power that a bank has in order to exercise banking powers. The fact that Century Financial is in fact subject to regulation by the Missouri Division of Finance and the federal banking laws is proof positive of this point.

ii. Loans Upon Pledges or Deposits

Reading the opinion of the Walton Construction case as literally as they can, Relator also argues that, despite its obvious status as a moneylender, Century Financial is not a "moneyed corporation" because the petition here does not state that Century Financial could make "'loans upon pledges or deposits,'" as opposed to loans secured by mortgages. (Brief of Relator at 21-22 & n. 10) The petition need not expressly allege this fact. Apart from the fact that Century Financial unquestionably exercises banking powers as an enterprise subject to state and federal banking laws, and is singularly engaged in the business of lending money secured by collateral, and notwithstanding the question of whether or not Century Financial also could or did in fact make or have the power to make loans upon

pledges or deposits, given the absence of any "merits" discovery on the point, Relator fails to offer any explanation as to why a distinction should be made between a "mortgage" and a "pledge" or "deposit" for purposes of defining a "moneyed corporation" under § 516.420 RSMo. The statute, itself, makes no such distinction. The word "mortgage" doesn't even appear. There is simply no logical basis for making Relator's distinction between a mortgage and a pledge, particularly since a business engaged in the mortgage lending business is a "moneyed corporation."

Relator's reliance on Sansone v. Sansone, 586 S.W.2d 87 (Mo. App. ED 1979) is misplaced. In Sansone, the court of appeals construed the word "mortgage" as used in § 516.150 RSMo, which pertains to actions or proceedings "under power of sale to foreclose any mortgage or deed of trust,…". Id. at 90. The court of appeals did not construe § 516.420 or even a statutory definition, which was itself defined, as was the case in Walton. Neither § 516.420 nor any other Missouri statute defines the term "moneyed corporation." However, New York statutes and cases make it clear that the term "moneyed corporation" was not synonymous with a bank or insurance company and included mortgage lenders such as Century Financial, whether or not they could or did in fact make loans upon pledges or deposits.

Accordingly, the Court should find that Respondent was able to and did in fact properly conclude that Century Financial was a "moneyed corporation" within the meaning of § 516.420 RSMo. As Respondent found on the record before him, "[The] real purpose … the bottom line purpose [of Century Financial and Relator] is to … handle money and handle loans." (SIO-PWP, Ex. 14 at 20-21) Respondent was

absolutely correct and the Court should quash its preliminary writ of prohibition. The plaintiffs' claims under the Missouri Second Mortgage Loans Act and § 408.562 RSMo. are governed by the 6-year statute of limitations set out in § 516.420 RSMo.

2. Because Century Financial is a "Moneyed Corporation," Respondent Correctly Applied the 6-Year Statute to the Plaintiffs' Claims

As the petition in this case makes clear, the named plaintiffs seek to "enforce a liability" and/or to recover a "penalty or forfeiture" imposed by Missouri law against and from Century Financial, a moneylender, and its various assignees, including the Relator Trusts. Specifically, the plaintiffs seek to recover both for themselves and for the individual members of the certified plaintiff class (1) the excessive, unauthorized and/or unlawful interest, origination fees, closing costs and interest that they were charged, contracted to pay and/or did in fact pay for their loans, (2) a forfeiture of or order barring the collection of any interest not yet due, and (3) punitive damages, and attorneys' fees. The plaintiffs seek this relief pursuant to the SMLA, §§ 408.233, 408.236, and 408.562 RSMo 2000, all Missouri statutes.[7]

[7] Section 408.562 RSMo 2000 provides as follows:

"In addition to any other remedies or penalties provided for by law, any person who suffers any loss of money or property as a result of any act, method or practice in violation of the provisions of sections 408.100 to 408.561 may bring an action in the circuit court of the county in which any of the defendants reside, in which the plaintiff resides, or in which the

Because plaintiffs are seeking to "enforce a liability" and/or to recover a "penalty or forfeiture" imposed by the SMLA and § 408.562 against and from Century Financial, a "moneyed corporation," and its derivatively liable assignees, which are also "moneyed corporations," the plaintiffs' claims are governed by § 516.420 RSMo. The language of § 516.420 is crystal clear: "all" suits "to recover any penalty or forfeiture imposed, or to enforce any liability created by any … law … shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created." § 516.420 RSMo. 2000. Accordingly, Respondent correctly denied Relator's motion for judgment on the pleadings and applied Missouri's 6-year statute. Cf. Nolan v. Kolar, 629 S.W.2d 661, 663 (Mo. App. 1982) (statute providing for forfeiture of 10% of amount of deed of trust for failure to timely acknowledge satisfaction of deed of trust was subject to § 516.420); Fielder v. Credit Acceptance Corp., 19 F. Supp.2d at 974 (6-year statute set out in § 516.420 applies to consumer class action brought against auto loan finance company pursuant to § 408.562 RSMo.).

Judge Ortrie Smith's opinion in Fielder is particularly persuasive and on point. In Fielder, the plaintiffs all purchased used automobiles, financed by a lender-assignee. The

---

transaction complained of occurred to recover actual damages. The court may, in its discretion, award punitive damages and may award to the prevailing party in such action attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary and proper."

plaintiffs brought a class action against the lender-assignee based on the seller's violations of the Motor Vehicle Time Sales Act, Chapter 365 of the Revised Missouri Statutes. 19 F.Supp.2d at 973. As purchasers aggrieved by a violation of that statutory enactment, the plaintiffs in Fielder sought to recover all of the "monies they paid for finance charges, delinquency and collection charges, as well as the right to injunctive relief, declaratory relief, punitive damages and attorneys' fees." Id. The purchasers sought this relief in part pursuant to § 408.562, the same statute on which the plaintiffs in this case rely. Just like Relator here, the defendant assignee in Fielder argued that the claims of some of the class members under § 408.562 were barred by Missouri's 3-year statute of limitations, § 516.130(2). Judge Smith rejected this argument and held that, because the defendant was a moneyed corporation, "the applicable statute of limitations [was] six years per Mo. Rev. Stat. Section 516.420." Id. at 975. The result in this case should be the same.

a. Section 516.420 Governs All Suits Against "Moneyed Corporations"

By its terms, Missouri's 6-year statute of limitations, § 516.420 RSMo, governs all suits against "moneyed corporations," in which a statutory liability is sought to be enforced. The language of the statute leaves no room for doubt: "all" suits "to recover any penalty or forfeiture imposed, or to enforce any liability created by any … law … shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created." § 516.420 RSMo. 2000.

The language of § 516.420 RSMo. is expansive and covers all claims against "moneyed corporations." The operation and effect of the statute is not limited to specific types of actions (e.g., remedial v. penal). The statute, instead, applies to claims against a specific type of defendant (i.e., a "moneyed corporation"). Because Century Financial and/or its assignees, including Relator, are such "moneyed corporations," Respondent correctly denied Relator's motion for summary judgment and applied Missouri's 6-year statue.

Relator's reliance on § 516.130(2) as the applicable statute of limitations is simply wrong. Section 516.130(2) is a general statute of limitations applicable to, *e.g*., actions "upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such a party and the state." § 516.130(2) RSMo Section 516.420 RSMo is a specific statute of limitations that applies to "all" actions brought against moneyed corporations like Century Financial and Relator. As the more specific statute addressing "all" suits against "moneyed corporations," § 516.420 RSMo. trumps or displaces § 516.130(2) RSMo. See, e.g., Laughlin v. Forgrave, 432 S.W.2d 308, 312-13 (Mo. banc 1968) (more specific statute of limitation prevails over general statute of limitation); see also § 516.300 RSMo. 2000 ("[§ 516.130] shall not extend to any action which is or shall be otherwise limited by any statute; but such action should be brought within the time limited but such statute"); § 516.420 RSMo. 2000 ("all" suits "to recover any penalty or forfeiture imposed, or to enforce any liability created by any … law … shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created"). The Court should

effectuate the statute as worded.

b. Plaintiffs' Claims Need Not be an Action Upon a Statute for a Penalty or Forfeiture to Fall Within § 516.420

The application of § 516.420 RSMo is not, as Relator argues, limited solely to an action upon a statute to enforce a penalty or forfeiture. The language of the statute is broader than that: it applies to "all" suits "to recover any penalty or forfeiture imposed, or to enforce any liability created by the act of incorporation on any other law." Hence, Plaintiffs' claims need not be an action upon which a statute to recover a penalty or forfeiture like that described in § 516.130(2) RSMo. An action such as this, to enforce a statutory liability made available under the SMLA and § 408.562 RSMo, unquestionably falls within the ambit of § 516.420 RSMo, even though it may not constitute an action upon a statute to enforce a "penalty or forfeiture." See Platt v. Wilmot, 193 U.S. 602, 609-10 (1904) ("the words 'liability created by law,' were held in Brinckerhoff v. Bostwick, 99 N.Y. 185, 1 N.E. 663 [1885], to mean statutory liabilities, which, as stated by Judge Earl (page 192, N.E. p. 666), 'comprehend not only liabilities created by the title and chapter of the Revised Statutes referred to, but also those created by other statutes and the Constitution of 1846 (art. 8, § 7)'"). As a result, § 516.420 RSMo by its terms applies to the plaintiffs' statutory claims. Walton, 985 S.W.2d at 155 (recourse to New York law is appropriate in construing the term "moneyed corporation as used in § 516.420").

c. Plaintiffs' Claims May Be Deemed an Action on a "Penal Statute"

Even if the Court concludes that, despite its plain language, § 516.420 RSMo only applies to actions arising from or based on a "penal statute," as opposed to any action or statutory action brought against a "moneyed corporation," the trial court still correctly applied the 6-year statute contained in § 516.420 RSMo. As Relator admits, the plaintiffs' action under the SMLA and § 408.562 constitutes a statutory action for a penalty or forfeiture. (Brief of Relator at 16) As such, the plaintiffs' statutory claims under the SMLA are governed by § 516.400 RSMo, which is unquestionably trumped by § 516.420 RSMo.

Relator suggests that plaintiffs' claims are instead governed by § 516.130(2) RSMo a 3-year statute. Section 516.130(2) provides:

> 516.130 What actions within three years, - (2) Ac action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state.

§ 516.130 RSMo. 2000.

However, Missouri has a second three year statute, § 516.400, which provides:

> 516.400. When penalty goes to party aggrieved, three years
>
> All actions upon any statute for any penalty or forfeiture, given in whole or in part to the party aggrieved, shall be commenced within three years after the commission of the offense, and not after.

§ 516.400 RSMo. 2000.

Given Relator's admissions that the plaintiffs' action constitutes an action upon a statute for a penalty or forfeiture given to the plaintiffs by § 408.562 RSMo as the

"parties aggrieved," the Court may find that the plaintiffs' claims are governed by § 516.420 RSMo.

Under the SMLA, it is ["unlawful"] for anyone to directly or indirectly charge, contract for or receive fees or costs in association with a second mortgage loan that are not permitted by the SMLA. Violators must forfeit all interest to which they would otherwise be entitled on the loan. See §§ 408.233, 408.236 RSMo. 2000. In addition, § 408.240 RSMo provides that persons who violate the SMLA or who participate in such a violation "shall be guilty of a Class A misdemeanor." These provisions render the SMLA a "penal" statute, at least for purposes of § 516.420 RSMo, the 6-year statute, in this case. See, e.g., Nolan, 629 S.W.2d at 663 (statute providing for forfeiture of 10% of amount of deed of trust for failure to timely acknowledge satisfaction of deed of trust was subject to 6-year statute of limitation on actions under penal statutes); Fielder, 19 F. Supp.2d at 974 (6-year statute set out in § 408.420 applies to consumer class action against auto loan finance company based on Chapter 365 RSMo. and § 408.562); see also King v. Morgan, 873 S.W.2d 272, 275 (Mo. App. 1994) (statute providing for misdemeanor and monetary penalties was penal in nature); Julian v. Burrus, 600 S.W.2d 133, 142 (Mo. App. 1980) (§ 408.050 RSMo. [which is similar to § 408.562] is a penal statute since it "primarily involve[s] the imposition of penalties and forfeitures and authorize[s] the aggrieved person to initiate … suit for the imposition of such as the legal vehicle and means whereby they could be imposed").

Relator's reliance on Julian v. Burrus is misplaced. While the court in Julian held that the plaintiff's usury claim under § 408.050 RSMo. was governed by the 3-year

statute in § 516.130(2) RSMo the defendant in Julian was not a "moneyed corporation." Hence, the court in Julian did not address the operation and effect of § 516.420 RSMo, which was irrelevant since the defendant was an individual. Moreover, the plaintiff in Julian did not argue that § 516.400 RSMo, Missouri's second 3-year statute for actions to enforce a statutory penalty, as opposed to § 516.130(2) applied to his claims (since nothing would have been gained if § 516.400 applied). Even if the court had applied § 516.400, the plaintiffs' claims against the defendant-individual would have still been barred. Accordingly, the opinion in Julian is neither persuasive nor dispositive of the limitations issue presented here.

If anything, the opinion in Julian actually supports Respondent's conclusion that the plaintiffs' claims under the SMLA and § 408.562 RSMo constitute an action to "enforce a liability" and/or to recover a "penalty or forfeiture" imposed by Missouri law and are therefore unquestionably governed by § 516.420 since Century Financial and/or Relator are "moneyed corporations." See Julian, 600 S.W.2d at 142 (§ 408.050 [which is similar to § 408.562] is a penal statute since § 408.050 "basically and primarily involve[s] the imposition of penalties and forfeitures and authorize[s] the aggrieved person to initiate the suit for the imposition of such as the legal vehicle and means whereby they could be imposed); Fielder, 19 F. Supp.2d at 974 (6-year statute set out in § 516.420 applies to consumer class action against auto loan finance company pursuant to § 408.562 RSMo.).[8]

[8] Both § 516.130(2) and § 516.400 conceivably could apply to those situations where the

Also misplaced in Relator's reliance on Tabor v. Ford, 240 S.W.2d 737 (Mo. App. 1951) is misplaced. (Brief of Relator at 45) The court in Tabor was construing the Emergency Price Control Act, a federal statute, solely for purposes for determining whether what used to be called the state magistrate court had jurisdiction over a claim to enforce that federal enactment. No issue or argument over the application of a statute of limitations was raised. Nor was there any discussion about whether an action under the SMLA and/or § 408.562 RSMo. was an action on a "penal" statute. The Tabor case is therefore inapposite, particularly since Relator contends that the named plaintiffs here seek to recover penalties and forfeitures under Missouri statutes. (Brief of Relator at 45) Relator is hard-pressed in light of this position to argue that the plaintiffs' claims do not fall within the purview of § 516.420 RSMo.

---

claimant brings an action on a penal statute against a defendant that is not a "moneyed corporation." See Powell v. St Louis Dairy Co., 276 F.2d 464, 465 (8th Cir. 1960 (plaintiffs' action against dairy "fall within the statutory provisions of limitations involving actions penal in nature, viz., § 516.130 and § 516.400, and provide for the barring of the action after three years").

3. Respondent Correctly Ruled that Relator Could not Raise a Limitations Defense Different from that Available to Century Financial

Relator argues as a fall back that, even if Century Financial is a "moneyed corporation," Respondent still impermissibly denied Relator's motion for summary judgment and applied the 6-year statute since Relator, unlike Century Financial, is not a "moneyed corporation." Relator's argument is flawed. Relator cannot argue that the claims of the named plaintiffs are barred by limitations.

From the inception of this lawsuit, the plaintiffs have alleged that Relator and all the other "Assignee Defendants" and holders of the unlawful loans were in effect *derivatively liable* (i.e., subject to all claims with respect to the mortgages) that the plaintiffs and the members of the plaintiff class could assert against Century Financial). All of the petitions in this case have alleged:

> As the purchasers and/or assignees and holders or as trustee for the assignees and holders of the notes and deeds of trust given under the Second Mortgage Loans by the REPRESENTATIVE PLAINTIFFS and every other member of THE SECOND MORTGAGE CLASS, the ASSIGNEE DEFENDANTS (individually, and as a defendant class, as hereinafter alleged) are liable to the REPRESENTATIVE PLAINTIFFS and THE SECOND MORTGAGE CLASS, <u>just as CENTURY FINANCIAL is liable to REPRESENTATIVE PLAINTIFFS and THE SECOND MORTGAGE CLASS</u>.

(OP, ¶33) (emphasis added)

The plaintiffs' theory of derivative liability is well grounded. As the purchasers and assignees (holders) of the residential second mortgage loans at issue in this case, Relator can be held liable to the named plaintiffs and to each of the other members of the

plaintiff class. It does not matter that Relator arguably may not have participated directly in the statutory violations on which the plaintiffs base their claims (although that fact has yet to be determined). What is truly important is that Relator purchased and holds the "high interest" loans that Century Financial originated and made in violation of Missouri law.

Such "assignee" liability for the plaintiffs' state law claims arises in the first instance by virtue of the HOEPA rule of assignee liability, 15 U.S.C. § 1641(d), which applies to "high cost mortgages" like those at issue here. 15 US.C. § 1641(d); Bryant v. Mortgage Capital Resource Corp., 197 F.Supp.2d 1357 (N.D. Ga. 2002). Such assignee liability can also arise by virtue of the well-established common law principle that an "assignee takes the obligation, chose, or other thing assigned subject to the same restrictions, limitations, and defects as it had in the hands of the assignor." St. Louis Union Trust Co. v. Hunt, 169 S.W.2d 433, 441 (Mo. App. 1943).

a. Assignee Liability Under 15 U.S.C. § 1641(d)

As a purchaser or assignee (holder) of the subject second mortgage home loans, Relator received the promissory notes and deeds of trusts for the loans "subject to all claims and defenses with respect to [the] mortgage[s] that the consumer [i.e., the named plaintiffs and other class members] could assert against the creditor of the mortgage [i.e., Century Financial], . . ." 15 U.S.C. § 1641(d). This includes the plaintiffs' claims for the violation of the SMLA. See Bryant, 197 F.Supp.2d at 1364-65 (consumers had affirmative right to assert claims against assignee based solely upon mortgage lender's independent violations of state law in connection with issuance of loans); Vandenbroeck v. ContiMortgage Corp.,

53 F.Supp.2d 965, 968 (W.D. Mich. 1999) (discussing operation of § 1641(d) in non-TILA cases).

Congress enacted 15 U.S.C. § 1641(d) as a part of the Home Ownership Equity Protection Act of 1994 ("HOEPA"). The statute in effect "eliminates holder-in-due-course protections for assignees of certain high cost mortgages [as defined by 15 U.S.C. § 1602(aa)] and renders them subject to all claims and defenses that the borrower could assert against the original lender." Vandenbroeck, 53 F.Supp.2d at 968 (emphasis added); Bryant, 197 F.Supp.2d at 1364-65. The operation and effect of § 1641(d) is unmistakable.

15 U.S.C. § 1641(d) in part provides:

> (1) … Any person who purchases or is otherwise assigned a mortgage referred to in [15 U.S.C. § 1602(aa)] shall be subject to all claims and defenses with respect to the that mortgage that the consumer could assert against the creditor of the mortgage, unless the purchaser or assignee demonstrates, by a preponderance of the evidence, that a reasonable person exercising ordinary due diligence, could not determine, based on the documentation required by this [title] . . .that the mortgage was a mortgage referred to in [15 U.S.C. § 1602 (aa)] ...

(Emphasis added.)

Section 1641(d)(1) provides in clear and unambiguous terms that assignees like Relator are subject to all claims and defenses under any law that a borrower could have asserted against the original lender. Vandenbroeck, 53 F.Supp.2d at 968. Hence, it does

not matter that Relator may not have initially charged the excessive fees and closing costs on which the plaintiffs bring their claims. Relator received the unlawful loans "subject to all of the claims" that the plaintiffs and other class members can assert against Century Financial. Since acquiring the loans, Relator has collected and received (and continue to collect and receive) interest on the loans. Relator has also collected and received a portion of the illegal origination fees and closing costs, since they were financed and paid as a part of the principal loan amounts. If Century Financial is barred from recovering any interest on the loans and/or if Century Financial is obligated to return the excessive or unauthorized origination fees and closing costs, so too must Relator, as an assignee and holder of the "tainted loans."

i. The Mortgages at Issue are "High Cost Mortgages"

Most if not all of the second mortgage home loans at issue in this case are believed to be "high cost mortgages" within the meaning of § 1641(d). As a result, the HOEPA rule of assignee liability applies under § 1641(d). To constitute a "high cost" mortgage within the meaning of § 1641(d), the loan must be a "closed-end loan" that is "not used for acquisition or construction," and having up-front fees or interest rates above certain "triggers" established by HOEPA. 15 U.S.C. § 1641(aa). There are two (2) such triggers: (1) the "APR" trigger (10% more than comparable Treasury securities); and (2) the "points and fees" trigger (originally $400 or 8% of the total loan amount). Either trigger will suffice.

Respondent submits that each of the loans on which the plaintiffs base their claims against Relator will (or likely may) satisfy either or both of the subject triggers. Each of the

named plaintiffs' loans do. The illegal charges, together with the other "points and fees" for the named plaintiffs' loans were payable by them at or before the loan closing and were in fact identified in the loan papers as being both "prepaid" (A176, 180, 186) and meet the points and fees trigger. In addition, the named plaintiffs' loans meet the interest trigger as well.[9] The fact that the loans were HOEPA loans was consistent with the HOEPA Notices that the named plaintiffs received as a part of their loan documents. (A178, 182, 188) Consequently, Respondent correctly held that, as the assignees and recipients of these "high cost mortgages," Relator was subject to and bound by the same limitations period applicable to Century Financial.

Respondent anticipates that Relator may cite in their reply to a recent decision from the United States District Court for the Western District of Tennessee in Terry v. Community Bank of Northern Virginia et al., 2003 WL 1571837 (W.D. Tenn.), and argue that the HOEPA rule of assignee liability does not apply. In Terry, the plaintiffs alleged in their complaint that plaintiffs "paid nothing at closing." Id. at *5. The district court held in the face of this allegation that the "points and fees" were not payable at or before closing but

[9]15 U.S.C. § 1602(aa)(1)(A). Compare the Annual Percentage Rate for the named plaintiff's loans (A177, 181, 187) with the comparable federal rates (A199-221) [Baker APR = 16.568% vs. 6.10% 10/15/97 (10-Year Maturity); Cox APR = 17.941% vs. 6.65% 08/15/97 (20-Year Maturity); and Springer APR = 16.648% vs. 6.65% 09/15/97 (20-Year Maturity)]; see 12 CFR Ch.II (1-1-01 Edition) Federal Reserve System, Pt. 226, Supp. I, Section 226.32(a)(1)(i)(1), (2) and (4) at page 441)]

were instead paid over the life of the loan. Terry is distinguishable. In this case, the "fees and points" were not only payable at or before closing, they were in fact "prepaid" as of the closing, according to the lender's own documents. (A176, 180, 186) To the extent that Relator argues that financing "points and fees" cancels the important consumer protections of HOEPA, not only would such completely undermine HOEPA, it simply would be wrong. Here the plaintiffs at this juncture of the proceeding are entitled to all favorable inferences in support of their claim and their claims that these are HOEPA loans must be presumed for purposes of this limitations issue.[10]

ii. The legislative History of § 1641(d)

Holding Relator liable for the "bad" loans of Century Financial makes good sense and effectuates the intention of Congress with regard to the second mortgage home loans at issue in this case. As the amended petition and referenced loan documents show, the named plaintiffs' experiences with Century Financial was neither unique nor accidental. Century Financial came to Missouri and intentionally overcharged the plaintiffs and over 555 other Missouri homeowners. (SIO-PWP: Ex. 14) Century Financial then scattered and sold these 555 plus "high cost" Missouri mortgages to a number of different entities, which in turn, sold and assigned the notes and deeds to still other entities, including

[10] Congress made no distinction in its efforts to protect borrowers from those that actually paid the high "fees and points" and those that financed them. See, e.g., Riegle Community Development Act, 1994 Pub.L.No. 103-325, 1994 U.S.C.C.A.N. 1908-1909 (discussing finance charges "imposed" directly or indirectly by the creditor).

Relator, which "pooled" the loans. (Id.) Neither Century Financial nor any of the subsequent assignees, including Relator, should be permitted to avoid liability by virtue of these shotgun assignments.

The legislative history of § 1641(d) makes clear the intention of Congress to hold assignees like Relator derivatively liable for the relief that borrowers like named plaintiffs seek. In describing its enactment, Congress put it this way:

> 9. Assignee Liability
>
> The bill eliminates "holder-in-due-course" protections for assignees of High Cost Mortgages. Assignees of High Cost Mortgages are subject to all claims and defenses, whether under Truth in Lending or other law, that could be raised against the original lender….
>
> By imposing assignee liability, the Committee seeks to ensure that the High Cost Mortgage market polices itself. Unscrupulous lenders were limited in the past by their own capital resources. Today, however, with loans sold on a regular basis, an unscrupulous player can create havoc in a community by selling loans as fast as they are originated. Providing assignee liability will halt the flow of capital to such lenders.

S.Rep. No. 169, 103d Cong., 2d Sess. 5 (1994) *reprinted in* 1994 U.S.C.C.A.N. 1881, 1912 (emphasis added).

The plaintiffs allege and believe that Century Financial was such an "unscrupulous player" and that Relator and each of the other players on the "secondary market" enabled Century Financial to make the subject unlawful loans and must now pay the price -

whether or not they were affiliated with Century Financial, or otherwise had actual knowledge of or directly participated in the wrongful conduct on which the plaintiffs base their claims. This is the point and purpose of § 1641(d). Given the potential for abuse, and the significant risk that homeowners like the named plaintiffs and the members of the plaintiff class might lose their homes if the original lender could simply transfer an unlawful loan to an assignee, which then asserted a "holder in due course" or some other defense, Congress decided to make the assignee jointly and severally liable with the lender, and expressly determined that the assignees will be subject to all "claims" and defenses that the borrowers could raise against the lender. Bryant, 197 F.Supp.2d at 1364-65.

b. Assignee Liability Under State Law

Even if some of the mortgages at issue in this case were not "high cost mortgages" within the meaning of HOEPA, Relator can still be liable to the plaintiffs and the plaintiff class as assignees under Missouri law. In Missouri, as in most other states, an assignee acquires no greater rights than the assignor had at the time of the assignment. Kracman v. Ozark Electric Cooperative, Inc., 816 S.W.2d 688 (Mo. App. S.D. 1991). Consequently, Relator and each of the other assignees (holders) of an Century Financial loan, took the promissory notes and trust deeds "subject to the same restrictions, limitations, and defects as [they] had in the hands of [Century Financial]." St. Louis Union Trust Co. v. Hunt, 169 S.W.2d 433, 441 (Mo. App. 1943). Hence, if Century Financial is barred from recovering any interest on the loan, so too is Relator, as its assignee. See also, e.g., Hilfiker v. Preyer, 690 S.W.2d 451, 453 (Mo. App. S.D. 1985) (assignee stands in stead of assignor);

Stewart v. Kane, 111 S.W.2d 971, 975 (Mo. App. 1938) (assignee "stands in the stead of the assignor and has no greater right or interest than [the assignor] had at the time of the assignment").[11]

In addition, the "holder in due course" defense will not be available to Relator, notwithstanding the operation and effect of § 1641(d). Each of the loans that Relator received came with the statutory notice required by 15 U.S.C. § 1641(d)(4). (See, e.g., A83, 94) The existence of the 1641(d)(4) notice eliminates any "holder in due course" defense to the plaintiffs' claims since it makes the borrowers' "promise to pay" conditional. See § 400.3-104(a) RSMo 2000 ("negotiable instrument" must contain an "unconditional" promise to pay); § 400.3-302(1) (holder in due course status requires presence of "negotiable instrument"); cf. Illinois State Bank of Quincy, Ill. v. Yates, 678 S.W.2d 819, 823-24 (Mo. App. E.D. 1984) (holder of note secured by deed of trust was

[11] Also see In re Cleveland, 53 B.R. 814, 819 (Bankr. E.D. Va. 1985) (assignee of trust deed stood in the shoes of assignors, taking no better a position than assignors, who held an invalid deed of trust); Foster v. Foster, 703 So.2d 1107, 1109 (Fla. App. Dist. 2 1997) ("assignee of a mortgage has the same status and rights as if he or she had been named in the mortgage"); Cole v. Angora Enterprises, Inc., 403 So.2d 1010, 1012 (Fla. App. 1981) ("assignee [of mortgage] with notice accedes to no greater rights than his assignor"); Financial Credit Corp. v. Williams, 229 A.2d 712, 715 (Md. App. 1967) ("[mortgage] can have no greater value in the hands of the appellant-assignee even if the assignee be deemed a bona fide purchaser for value").

not holder in due course given condition); Thomas v. Ford Motor Credit Co., 429 A.2d 277, 281-82 (Md. App. 1981) (existence of consumer credit notice "eliminate[s] the possibility of anyone acquiring holder-in-due-course status"). Without such a defense, Relator will be liable to the plaintiffs and the other class members whose loans they hold.

Furthermore, liability may also be imposed against Relator if they are found to be so closely connected to Century Financial or one another that any or all should be considered one-in-the-same for purposes of the subject loans, see, e.g., Kaw Valley State Bank & Trust Co. v. Riddle, 549 P.2d 927 (Kan. 1976) (denying holder in due course status given close relationship with assignor), or if, as here, the second mortgage loans are invalid as to the interest paid and due pursuant to § 408.236 RSMo 2000 given the excessive "origination" fees and closing costs, cf. Lucas v. Beco Homes, Inc., 494 S.W.2d 417 (Mo. App. 1973) ("usury" is not a defense to holder-in-due-course status), or if Relator knew of or participated in the unlawful lending scheme on which the plaintiffs base their claims (thereby negating the "good faith" requirement), thereby giving rise to a civil conspiracy.[12]

[12] Also, since the illegal non-interest charges that the lender initially charged and contracted for in violation of § 408.233.1 were funded as a part of the principal loan amount, Relator, itself, is "receiving," and therefore "violating," the SMLA each time it receives a monthly loan payment, separate and apart from the receipt of illegal interest.

4. As an Assignee, Relator Cannot Assert a Limitations Defense Different from that Available to Century Financial

Because the liability that the named plaintiffs seek to impose against Relator and the other "non-originating" defendants is derivative of the liability of Century Financial, and not separate and distinct from it, Relator, by definition, cannot raise a limitations defense different from that available to Century Financial. Hence, a timely suit against Century Financial is by necessity a timely suit against all other entities like Relator, which are derivatively liable for the wrongful acts of Century Financial. See 15 U.S.C. § 1641(d)(1) ("any person who purchases or is otherwise assigned a [HOEPA] mortgage … shall be subject to all claims and defenses with respect to that mortgage that the consumer could asset against the creditor of the mortgage..."); Bryant, 197 F. Supp.2d at 1364-65 (consumers had affirmative right to assert claims against assignee based solely upon mortgage lender's independent violations of state law in connection with issuance of loans); Cooper v. First Government Mortgage & Investment Corp., 238 F.Supp.2d 50, 55 (D.D.C. 2002) ("Congress made assignees subject to all claims and defenses, whether under [TILA] or other law, that could be raised against the original lender"); Miller v. Pacific Shore Funding, 224 F.Supp.2d 977, 996-97 (D. Md. 2002) (period of limitation applicable to claims against residential second mortgage lender governs claims against assignee alleged to be derivatively liable for lenders' acts under HOEPA).

Such a rule makes sense. When a plaintiff alleges that one defendant is derivatively liable for the acts of another, the plaintiff is essentially arguing that the two defendants are the same for purposes of her claims. This is the nature of derivative

liability. The "derivatively liable" defendant has not committed a separate actionable wrong, so there is no separate conduct or injury to discover before the plaintiff's cause of action accrues and the limitations period begins to run. Therefore, a defendant derivatively liable for the acts of another is regarded as the same legal entity for statue of limitations purposes. See, e.g., Miller, 224 F.Supp.2d at 996-97 (period of limitation applicable to claims against residential second mortgage lender also applied to claims against assignee alleged to be derivatively liable for lenders' acts under HOEPA); cf. National Labor Relations Board v. O'Neill, 965 F.2d 1522, 1529 (9th Cir. 1992) (where two parties are alter egos, and derivatively liable for each other, timely service against one is sufficient to initiate proceedings against both); Wm. Passalacqua Builders v. Resnick Developers South, 933 F.2d 131, 143 (2d Cir. 1991) (action to enforce judgment against alter ego companies is not time-barred because alter egos are treated as one entity); Livingstone v. Dept. of Treasury, 456 NW2d 684 (Mich. 1990) (timely assessment against corporate taxpayer preserved later-filed assessment against derivatively liable corporate officer).

Relator argues that the opinion in Nolan v. Kolar, 629 S.W.2d 661 (Mo.App. ED 1982) stands for the proposition that they are entitled to their "own" statute of limitations. That is not correct. The plaintiff in Nolan did not allege that one of the two defendants she sued was derivatively liable for the acts of the other, e.g., under a theory like *respondeat superior*. Rather, the plaintiff brought her claims against the individual defendants and the defendant bank, each in their/its own capacity. That is not the case here. (A30-31, ¶58) Moreover, Nolan did not involve 15 U.S.C. § 1641(d) or address

the language of the statute and its unambiguous mandate that a purchaser or assignee of second mortgage home loan, receive the loans "subject to all claims and defenses with respect to [the] mortgage[s] that the consumer [i.e., the plaintiffs and the other class members] could assert against the creditor of the mortgage [i.e., Century Financial]." On this point Nolan is inapposite.

Relying on Dash v. FirstPlus Home Loan Trust 1996-2, 2003 WL 103855 (M.D.N.C.) and Dowdy v. First Metropolitan Mortgage Co., 2002 WL 745851 (N.D. Ill. 2002) Relator argues that 15 U.S.C. § 1641(d) does not make an assignee of a "HOEPA" loan responsible for the acts of the loan originator. Neither case is at odds with what Respondent decided. The plaintiffs here do not seek to enforce a "new" or different "claim" against Relator. To the contrary, and as their petitions make clear, Relator seeks to assert the very same state law statutory claims that they are able to assert against Century Financial against Relator as well, as the assignees of the unlawful loans. This is precisely what the statute allows. 15 U.S.C. § 1641(d). Since the claims are the same, there by definition cannot be two separate or different periods of limitations. Consequently, Respondent correctly decided that the 6-year statute would apply as against Relator as well.[13]

[13] To the extent Dash or Dowdy holds otherwise, they were incorrectly decided. See Bryant, 197 F.Supp.2d at 1364-64. Also, the 1-year statute of limitations "under HOEPA" that Relator cites (Brief at 32) applies solely to a private right of action brought pursuant to 15 U.S.C. § 1640. Hence, the 1-year statute of limitations does not apply

Citing to the plaintiffs' suggestions in support of a motion to remand (Relator Appendix, A158), Relator argues that the plaintiffs are "judicially estopped" from arguing that Relator can be held jonitly and severally liable with Century Financial under the HOEPA rule, 16 U.S.C. §1641(d). Relator's argument is unconvincing. The plaintiffs simply have not taken an inconsistent or contrary position with regard to the HOEPA rule. Relying first Vandenbroeck, and later on Bryant, and always relying on the express and unambiguous language of the statute itself, the plaintiffs have consistently argued that while, the HOEPA rule of assignee liability does not give rise to an independent claim or cause of action (and is not an element of the plaintiffs' SMLA claims), the statute nevertheless eliminated the holder-in-due course defense and renders assignees like Relator of tainted or ("BAD") high cost loans derivatively liable to the borrowers along with the original lender. This is exactly what the statute says; it is also what the courts in both Vandenbroeck and Bryant held. The plaintiffs have never argued otherwise. (SIO-PWP, Ex. 7 [Original Petition], ¶33) As a result, both Shockley v. Div. of Child Support, 980 S.W.2d 173 (Mo. App. ED 1998) and St. Louis Public Service Co. v. City of St. Louis, 302 S.W.2d 875 (Mo. 1957) are in apposite.[14]

---

since the plaintiffs are not asserting such a right of action. They merely seek to hold the assignees of the unlawful loans liable as the "enabler" of the loans, just as Congress intended.

[14] In Shockley, the court held that the Division of Child Support Enforcement was judicially estopped from taking the position that there was no "court order" under §

The plaintiffs rely on the statute, which by its terms, does not itself create any new federal law claim or cause of action; the statute instead eliminates all defenses that Relator could conceivably raise in the face of the plaintiffs' otherwise legally sufficient state law claims and makes Relator and all other assignees joint, severally and derivatively liable to the plaintiffs along with Century Financial. As the legislative history of the enactment provides:

> 9. Assignee Liability
>
> The bill eliminates "holder-in-due-course" protections for assignees of High Cost Mortgages. Assignees of High Cost Mortgages are subject to all claims and defenses, whether under Truth in Lending or other law, that could be raised against the original lender….

S.Rep. No. 169, 103d Cong., 2d Sess. 5 (1994) *reprinted in* 1994 U.S.C.C.A.N. 1881, 1912 (emphasis added).[15]

454.460(2) when it had previously filed a motion to modify that very order, which was denied. Id. at 175-76. Even more remote is this Court's decision in St. Louis Public Service Co.. There, the Court held that the plaintiff was estopped from claiming that he should not have to comply with an ordinance that it benefited from for nearly 25 years. Id. at 881-82.

[15] Cf. *state court* cases involving the similar FTC Holder Rule: Rosemond v. Campbell, 343 S.E.2d 641, 646 (S.C. App. 1986) ("the assignee's liability under the [FTC] statutes is derivative: unless the consumer has a valid claim against the seller, he has no claim against the assignee"); Oxford Finance Companies, Inc. v. Velez, 807 S.W.2d 460 (Tex. App. 1991) (FTC Holder Rule "notifies *all potential holders* that, if, they accept

This principle is simple and fair: A loan that violates Missouri law cannot suddenly become "lawful" when it ends up in the hands of an "assignee" – especially where, as here, the original lender never intended to keep the loan in the first place and the "assignee" is in the business of buying up such loans for a profit. It would indeed be grossly unjust if, as Relator suggests, the remedies and relief available to aggrieved borrowers like the plaintiffs were extinguished completely, simply because the lender that signed them up in violation of the SMLA turned around and assigned the loan papers to a "professional" assignee the very next day, and under a scheme that was in place before the illegal loans were ever made. Congress recognized as much when it enacted 15 U.S.C. § 1641(d), a statute that does not create any federal law claim or separate cause of action, but which simply renders an assignee derivatively liable for all of the claims (contract and tort) that a plaintiff can otherwise legally state against the assignor. Bryant, 197 F.Supp.2d at 1364-65.

---

assignment of the contract, they will be 'stepping into the seller's shoes'"); also cf. 41 Fed.Reg. 20,023-24 (1976) ("the words 'Claims and Defenses' … [as used by the FTC] are not given any special definition by the [FTC] … The phrase simply incorporates those things, which as a matter of other applicable law, constitute legally sufficient claims and defenses in a sales transaction … Appropriate statutes, decisions, and rules in each transaction will control…."); cf. also LaBarre v. Credit Acceptance Corp., 175 F.3d 640, 644 (8th Cir. [Minn.] 1999) (FTC Holder Rule allows consumers to assert state-related claims and defenses against any holder of a consumer contract).

5. Even if the Court Determines that Relator is Entitled to its Own Statute of Limitations, the Statute is Still Six (6) Years Since Relator is Itself a "Moneyed Corporation" within the Meaning of § 516.420 RSMo

Although the plaintiffs have not had an opportunity to discover and fully develop the facts material to this particular point, the record in this and other similar second mortgage cases shows that Relator, itself is also properly considered a "moneyed corporation." Hence, even if Relator is in some way entitled to its "own" statute of limitations, a point that Respondent denies, the statute is still Missouri's 6-year statute, § 516.420 RSMo 2000.

Relator is a business trust engaged in the business of buying loans (streams of money), which it uses to collateralize certain notes or evidences of indebtedness that it sells to the public for investment. As its prospectus reveals, Relator was created to hold $271 million dollars in high interest rate second mortgage loans. (SIO-PWP, Ex. 5 at 2) The investment interests in this mortgage pool is created through the issuance of a series of asset backed notes. (Id.) The prospectus expressly describes Relator's activities to include "aquiring, holding and collecting principal and interest on the Home Loans and the other assets of the Trust and proceed therefrom" and "making payment on the securities…." (Id. at 24) If not sufficient to show that Relator, itself, is a "moneyed corporation" as a matter of law, the evidence and inferences arising therefrom is at the very least such that a reasonable jury could conclude as much. Try as it might, Relator simply cannot avoid this result.

a. Relator's Status as a "Statutory" Trust Does not Preclude a Finding that Relator is a "Moneyed Corporation" for Purposes of § 516.420 RSMo

Relator argues that it cannot be a "moneyed corporation" because it is a business "trust" rather than a "corporation." The Court should reject this argument for a number of reasons.

First, Relator's argument elevates form over substance and is directly contrary to the Missouri Constitution, which defines a "corporation" as "all joint stock companies or associations having any powers or privileges not possessed by individuals or partnerships." Mo. Const., art. 11, § 1; see Forest City Mfg. Co. v. International Ladies' Garment Workers' Union Local, No. 104, 111 S.W.2d 934, 939 (Mo. App. 1938) (construing art. 12, § 11 of the Constitution of 1875 [now art. 11, § 1] and related statutory provisions to mean that such associations (i.e., those having powers or privileges not possessed by individuals or partnerships) are to be treated as corporations under Missouri law); see also General Heat and Power Co., Inc. v. Diversified Mortgage Investors, 552 F.2d 556, 559 (3rd Cir. 1977) (district court's interpretation of Pennsylvania long arm statute as applying only to corporations is patently unreasonable because it effectively leaves partnerships, joint stock companies and business trusts entirely outside the reach of the statute). Accordingly, the Court should hold that, as business trusts, Relator may be deemed to be (and is) a "moneyed corporation" under § 516.420 RSMo.

Second, Relator's argument ignores the reality that when § 516.420 was enacted in

1865, there were no "statutory" trusts. Moreover, even though a business trust may not be a "corporation" in a technical sense, Relator has the attributes of a corporation and is similar in its practical effect, as the trust documents demonstrate. See State Street Trust Co. v. Hall, 41 N.E.2d 30, 33 (Mass. 1942); Swartz v. Sher, 184 N.E.2d 51 (Mass. 1962); 12 Del. C. §§ 3801, et seq. The "estate" of the trust corresponds to the capital of the incorporated company, the trustees to the board of directors, the beneficiaries to the stockholders, the beneficial interests to shares of stock, and the declaration of trust, to the charter. This is why several courts have held that a business trust falls within the legal definition of a corporation for purposes of state corporation law and taxation. See id. In fact, and as stated above, Missouri places business trusts in the same category as corporations. See Mo. Const., art. 11, § 1; (N.Y. Rev. Stat. - A331-334: referring to "corporation[s] or association[s] as "moneyed corporations"); see also Restatement (Second) Trust, § 1 (1959) comment b (excluding a business trust from the "trust" rules since it is "a special kind of business association and can best be dealt with in connection with other business associations").

b. Relator Exercises "Banking Powers" and is a "Moneyed Corporation"

Relator also argues that its activities do not fall within the confines of the definition of "moneyed corporation" as stated by the court of appeals in Walton Construction. Respondent disagrees.

For reasons substantially the same as those discussed with regard to Century Financial above, Relator is properly regarded as a "moneyed corporation." Relator is a

"secondary market" assignee, singularly engaged in the business of purchasing, acquiring and pooling a number of second mortgage loans solely for the purposes of investment. Relator, through its bank trustees (Bank of New York and Wilmington Trust Company), pooled the loans with numerous others as collateral to back a series of asset-backed notes that Relator sold to the public. Relator, through its loan servicing agent and Bank of New York, also collected the monthly loan payments due on the second mortgage home loans and disbursed the money to its investors. As issuers of asset-backed notes, Relator is engaged in an activity falling within the "incidental powers" of a bank. See Securities Industry Assoc. v. Security Pacific Bank, 885 F.2d 1034, 1044-45 (2nd Cir. 1989) (citing decision of the Comptroller of Currency: "the process of pooling bank assets and selling certificates representing interests therein .. is a convenient and useful means of selling mortgages [and thus] falls within the 'incidental powers' of a national bank"). Relator, through Master Financial, also recognizes the authority of the Missouri Division of Finance over the loans it holds. (A198)

Although Relator argued otherwise, Respondent, who is now all too familiar with how Relator operates, rejected this form over substance argument and concluded that the Relator, itself, just like Century Financial, was a "moneyed corporation." As Respondent observed:

> Reading several of these cases over the course of weeks, it has been a little bit confusing to me, but I think the Walton case does help. Maybe in my simplistic mind, I try to simplify too much, but to me, when I'm looking at something as a moneyed or non-moneyed corporation so I can distinguish between the three and six-year statute of limitations, I look at it in terms of what's the real purpose of the defendant in this case, the business I'm dealing with or what I'm looking at? In Walton, the real business was

> construction, the real business is just individuals loaning money or helping out. They have other lives. They're not set up for the purpose of dealing with money.
>
> The companies I'm dealing with in this case and the other cases that are before me right now are corporations that are set up for the purpose of dealing with money.
>
> The bottom line purpose of all of these companies is to handle money and to handle money by loans and to handle loans. There may be corporate shells all up and down the line here, and there may be technical severance of obligations and boards and purposes which try to deal with statutes and states and usury laws and whatever else it might be, but they're all set up for one purpose, and that is to work hand in hand for the handling of loans and money, loans to people on second mortgages, the collection of that money, the distribution of that money.
>
> Thus, I think they're a moneyed corporation. If I didn't make that clear last week, I want to make it clear now because that's what the heart of this thing is.

(SIO-PWP, Ex. 14 at 21-22) (emphasis added)

Respondent's reasoning and logic are sound; and the Court should adopt Respondent's reasoning and hold that Relator, too, is a "moneyed corporation" under § 516.420 RSMo 2000 as a matter of law. Alternatively, the Court should find that Relator, at the very least, may be deemed to be a "moneyed corporation" if the evidence in the case as more fully developed shows it to be a business having "banking" powers or otherwise engaged in the business of using money to make money. See Fielder, 19 F.Supp.2d 966; Marble Mortgage, 241 Cal.App.2d 56, 50 Cal. Rptr. 345; Grice v. Anderson, 96 S.E. 222, 224 (citing Platt v. Wilmot, 103 U.S. 602(1904): "If a corporation shall make it a business to lend money, to borrow money, to deal in negotiable paper, bonds, stocks, and other securities, it is a moneyed corporation").

C. THE RECORD IS NOT FULLY DEVELOPED

Relator has repeatedly argued in its brief that there is "no evidence" in the record of a fact, and ergo, that fact does not exist. The factual premise Relator asserts in this argument does not justify the inferential legal conclusion Relator reaches because of the procedural posture of this case. That there is "no evidence" in the record proves nothing at this procedural juncture. "Merits" discovery has not occurred. The lack of a factual record is caused by Relator's request for a review by writ of a ruling on a motion for summary judgment.

The best example of Relator's use of this argument is found in their brief at pp. 36-37. There, Relator argues that there is "no evidence" that Century Financial is "a moneyed corporation." Of course there would not be expected to be evidence at this stage of the proceeding as to those facts which might bear on that factual determination. Moreover, Relator fails to note that there is as yet no evidence in the case establishing when it was that the named plaintiffs, as the "aggrieved parties" first "discovered" the "facts upon which [the] penalty or forfeiture [they seek to recover] attached, or by which [the] liability [they seek to enforce] was created." § 516.420 RSMo 2000.[16] Consequently, Respondent respectfully suggests that, if there are factual questions that may impact the Court's ultimate decision in this case, it should be mindful that the record

[16] Certainly if Relator's argument is accepted, the statute would not have begun to run against Relator when the loans were made in 1997 since Relator didn't even own them at that point.

is far from fully developed and quash the preliminary writ and return this matter to the trial court for full development of the factual record.

II.

THE COURT SHOULD QUASH ITS PRELIMINARY ORDER OF PROHIBITION BECAUSE UNDER EITHER A SIX-YEAR OR THREE-YEAR STATUTE OF LIMITATIONS, PLAINTIFFS' CLAIMS ARE TIMELY IN THAT: (A) COMMENCEMENT OF SUIT AGAINST CENTURY FINANCIAL IN LESS THAN THREE YEARS FROM THE DATE OF THE NAMED PLAINTIFFS' LOANS MAKES SUIT TIMELY AGAINST RELATOR AND ALL OTHER ASSIGNEE DEFENDANTS REGARDLESS OF WHAT LIMITATIONS PERIOD OR ACCRUAL DATE IS APPLIED; (B) COMMENCEMENT OF SUIT ON JUNE 28, 2000 AGAINST A DEFENDANT CLASS TOLLED CLAIMS AGAINST ANY MEMBER OF THAT CLASS, INCLUDING RELATOR; (C) BRINGING RELATOR INTO THE SUIT ON JULY 12, 2001 RELATES BACK TO THE ORIGINAL FILING OF SUIT AGAINST DEFENDANT MASTER FINANCIAL; AND (D) THE SMLA MAKES IT ILLEGAL TO HAVE "DIRECTLY OR INDIRECTLY CHARGED, CONTRACTED FOR OR RECEIVED" ANY ILLEGAL FEES AND SO THE LIMITATIONS PERIOD RUNS FROM THE LAST TIME A BORROWER IS CHARGED OR THE NOTE HOLDER RECEIVES ILLEGAL FEES AND/OR INTEREST AND RELATOR RECEIVED PAYMENT FROM THE NAMED PLAINTIFFS WITHIN THREE YEARS OF THE COMMENCMENT OF SUIT AGAINST RELATOR.

A. COMMENCEMENT OF SUIT AGAINST CENTURY FINANCIAL IN LESS THAN THREE YEARS FROM THE DATE OF THE NAMED PLAINTIFFS' LOANS MAKES SUIT TIMELY AGAINST RELATOR AND ALL OTHER ASSIGNEE DEFENDANTS REGARDLESS OF WHAT LIMITATIONS PERIOD OR ACCRUAL DATE IS APPLIED

Because Relator is derivatively and jointly and severally liable for the acts of Century Financial as the assignee and holder of the unlawful second mortgage loans at issue in this case, commencement of suit against Century Financial within three years by a named plaintiff means that suit against any assignee defendant, including Relator, also is timely. See supra Point I.B.3.

B. COMMENCEMENT OF SUIT ON JUNE 28, 2000 AGAINST A DEFENDANT CLASS TOLLED CLAIMS AGAINST ANY MEMBER OF THAT CLASS, INCLUDING RELATOR

Even assuming that SMLA claims accrue at the date of the loan, the claims against Relator are not time barred under the 3-year statute of limitations as the limitations period for claims against the defendant class, which includes Relator, was tolled when the Original Petition was filed on June 28, 2000.[17]

[17]As asserted in section D below, because there is a continuing violation with each loan payment, the SMLA claim accrues on the date of the most recent payment.

Jill and Jim Baker obtained their second mortgage loan from Century Financial on December 8, 1997. Two and one-half years later, on June 28, 2000, the Bakers commenced this lawsuit asserting claims under the SMLA on behalf of themselves and a plaintiff class against Century Financial and also against Master Financial, Inc., individually and as the representative of a defendant class of assignees that obtained loans originated by Century Financial. Indeed, the first paragraph of the Petition makes clear that the claims are being asserted against a defendant class: "This action is brought as a plaintiffs' class action against CENTURY FINANCIAL GROUP, INC. … and defendants **(including a defendant class)** that have purchased or had assigned and now hold or previously held the hereinafter described second mortgages." (SIO-PWP, Ex. 7, ¶ 1 (emphasis added)) The original Petition later defines the defendant class to include any person or entity or their trustee that ever received any interest on the second mortgage loans at issue or that "have every held or now hold, by virtue of transfer or assignment or otherwise (including acting as trustee of such holder or assignee), the Second Mortgage Loans of the REPRESENTATIVE PLAINTIFFS or THE SECOND MORTGAGE CLASS…" (SIO-PWP, Ex**.** 7, ¶39) As the holder of the Bakers' second mortgage loan, Relator is undisputedly within the defendant class.

The principle that the commencement of the original class action suit tolls the running of the statute of limitations for all members of the putative class until the class is certified or certification is denied was made clear by the Supreme Court in American Pipe and Construction Co. v. Utah, 414 U.S. 538, 554, 94 S.Ct. 756 (1974). American Pipe involved a plaintiff class action but it was subsequently determined that tolling

applies equally to defendant classes. Appleton Electric Co. v. Graves Truck Line, Inc., 635 F.2d 603, 609-10 (7th Cir. 1980), cert denied, 451 U.S. 976 (1981).

Relator seeks to avoid the result of tolling by contending that class action tolling applies "only to claims against parties named as defendants in the original petition." (Relators' Brief at 38) This statement makes no sense as there would never be a need to toll the statute of limitations as to a defendant party originally named. Instead, what Relator apparently means is that the tolling only begins as to a particular defendant when that defendant is added to the suit as that is the holding of Chevalier v. Baird Savings Ass'n, 72 F.R.D. 140, 155 (D.C. Pa. 1976) to which Relator cites. The rational of the Chevalier court was that to toll as to all defendants in the class from the filing of the original petition could potentially cause a party to defend an action that such party does not learn of until after the statute of limitations had run. Id. While this statement in some circumstances could be true, it reveals that the Chevalier court did not appreciate the interplay between statutes of limitations and the objectives of the class action procedure and, correspondingly, the ruling in American Pipe.

The class action procedure is based on the notions of judicial economy in not having multiple plaintiffs or defendants asserting separate claims over the same basic claim. Instead, the class action device allows representative parties to advance the interests of all class members. To require that all parties be named to avoid any statute of

limitations issues would abrogate the whole basis for having class proceedings in the first place.[18]

Understandably then, Chevalier has been universally rejected. For example, in holding that the class action tolling doctrine applies equally to a defendant class the Seventh Circuit went to great length to dispose of Chevalier:

> We do not agree with the Chevalier decision. … Our reading of the cases convinces us that due process is not offended by the tolling doctrine, even where a defendant has no notice of a suit until after a limitations period has run. Cf. United States v. Wahl, supra. The Supreme Court specifically rejected the contention that due process was abridged by the tolling doctrine in American Pipe , supra, 414 U.S. at 556,-59, 94 S.Ct. at 767-69.
>
> We are persuaded that implicit in the Supreme Court's American Pipe decision was the Court's determination that "effectuation of the purpose of litigative efficiency and economy," (which Rule 23 was designed to perform) transcends the policies of repose and certainty behind statutes of limitations. 414 U.S. at 556, 94 S.Ct. at 767. We are guided by

[18] Any claim of prejudice from a lack of notice of the suit by Relator would ring hollow as it has known from the original filing of the existence of and nature of the Plaintiffs' claims as its loan servicer (and therefore its agent) Master Financial was named in the original Petition.

> that conclusion in the instant case to hold that where a class action suit is instituted against a class of unnamed defendants, pursuant to Rule 23(b)(3), the statute of limitations is tolled as to all putative members of the defendant class. Where, as here, the class is ultimately certified, we hold that the statute is tolled as to any particular defendant until he is notified of the suit and chooses to opt out.
>
> A contrary rule would sound the death knell for suits brought against a defendant class, nullifying that part of Rule 23 that specifically authorizes such suits. This, in turn, would have a potentially devastating effect on the federal courts. Plaintiffs would, in each case, be required to file protective suits, pending class certification, to stop the running of the statute of limitations.

Appleton Electric Co., 635 F.2d at 609-10.

The same conclusion was reached by the Alabama Supreme Court which, in holding that the statute of limitations was tolled as to the entire defendant class from the inception of the defendant class claim, stated as follows: "We do not agree with the holding in *Chevalier*. We find that the better rule is the one expressed by the Seventh Circuit Court of Appeals in *Appleton Electric Co. v. Graves Truck Line, Inc.* [full citation omitted]." White v. Sims, 470 So.2d 1191, 1193 (Ala. 1985); see also In re Activision Securities Litigation, 1986 WL 15339, *3 (N.D. Cal.) (statute of limitations as to a defendant class was tolled from the filing of the defendant class claims); In re Bestline Products Securities and Antitrust Litigation, 1975 WL 386, *3 (S.D. Fla.) (statute of

limitations as to claims against defendant class tolled as to all defendant class members from initiation of suit until time certification as to the defendant class was denied).

Relator's claim that Appleton is distinguishable because in Appleton the class was certified prior to the running of the limitations also makes no sense. (Brief of Relator at 39, n. 15) Under this argument, tolling as to a defendant class only exists in those cases in which certification occurs before the statute of limitations expires as to any defendant. Any number of examples establish the absurdity of this contention and certainly the result of such a rule would be that a plaintiff would name every possible defendant from the outset which, of course, is the type of abrogation of the class device that the Supreme Court sought to avoid by establishing the doctrine of class action tolling.[19] See American Pipe, 414 U.S. at 551 (no tolling in class actions would require each class member (plaintiffs in this case) to file a claim before the running of the limitations period which is "precisely the multiplicity of activity which Rule 23 was designed to avoid"). That the timing of certification (and, therefore, Relator's argument) is irrelevant to the tolling issue is made clear by the fact that tolling occurs regardless of the ultimate outcome of

[19] Most obviously, under such a rule whether or not there is tolling depends on the speed with which the litigation progresses -- in large part an arbitrary function. As a practical matter, there would never be tolling in a matter in which the suit was filed just prior to the expiration of the limitations period. Such a rule also would foster attempts at purposeful delay by named defendants that have, as in many of these second mortgage cases, a unity of interest with unnamed members of the putative defendant class.

the certification question as it runs to either when the class member opts out of a certified class or certification is denied. Appleton Electric Co., 635 F.2d at 609 (tolling of defendant class runs until certification denied or until defendant class member opts out of certified class). Plainly, the fact that no defendant class has been certified is irrelevant to the issue of class action tolling.

In the related Couch matter, the Relators (FirstPlus Home Loan Owner Trust 1998-1 and 1998-2) argue that the Seventh Circuit decision in Appleton should not be followed as it has been "rejected" by the majority of courts to consider the issue. Anticipating a copycat argument in the instant Relator's Reply brief, Respondent will preemptively demonstrate that any such argument fails

First, the Appleton decision comes from the highest court to consider the issue and from that decision a writ of certiorari to the Supreme Court was denied. Second, the matter, there would never be tolling in a matter in which the suit was filed just prior to the expiration of the limitations period. Such a rule also would foster attempts at purposeful delay by named defendants that have, as in many of these second mortgage cases, a unity of interest with unnamed members of the putative defendant class.

Second, the majority of the courts considering the issue actually follow Appleton and hold that tolling as to a defendant class occurs regardless of whether the defendant class member has actual notice of the claim prior to the expiration of the statute of limitations. Compare White v. Sims, 470 So.2d 1191, 1193 (Ala. 1985) (tolling as to defendant class from time defendant class claims filed); In re Activision Securities Litigation, 1986 WL 15339, *3 (N.D. Cal.) (statute of limitations as to a defendant class

was tolled from the filing of the defendant class claims); In re Bestline Products Securities and Antitrust Litigation, 1975 WL 386, *3 (S.D. Fla.) (statute of limitations as to claims against defendant class tolled as to all defendant class members from initiation of those claims until certification as to the defendant class was denied) with Meadows v. Pacific Inland Securities Corp., 36 F.Supp.2d 1240 (S.D. Cal. 1999) (holding that no tolling as to defendant class unless plaintiff could show that the defendant class member did have notice of the pendency of the class action).[20]

[20] As to the other cases the Relators in Couch list as part of this "majority" -- In re Activision Securities Litigation, Chevalier and Carlson v. Independent School Dist. No. 623, 392 N.W.2d 216, 223 (Minn. 1986) -- none reject Appleton or are otherwise in accord with Meadows. While In re Activision Securities Litigation does discuss the importance of notice to the defendant class members, the holding of the case was as noted above -- the statute of limitations was tolled as to the entire defendant class from the date of the filing of the defendant class claims. Id. at * 3. Chevalier, decided in 1976, obviously does not address Appleton, a 1980 decision, but holds that there can be no tolling until the defendant is actually named in the suit. Chevalier, 72 F.R.D. at 155. No other court has adopted the holding of Chevalier but as noted above it has been widely criticized. Further, neither Relator nor any other assignee defendant can credibly contend that there can be no tolling until a defendant is actually added when they have argued successfully that prior to certification the named plaintiffs have standing to sue only those assignee defendants that actually hold such named plaintiffs' loans. That is, you cannot

Finally, the ultimate holding of Meadows v. Pacific Inland Securities Corp., 36 F.Supp.2d 1240 (S.D. Cal 1999) was that the court allowed the plaintiffs leave to amend their complaint to assert that the putative class defendants did have notice of the class action on which they based their tolling argument. Meadows, 36 F.Supp.2d at 1250. Likewise, should this court feel that "notice" to the putative defendant class members is necessary to have tolling as to a defendant class, Plaintiffs should be given the

---

say out of one side of your mouth that there is no tolling unless you actually add the defendant and from the other side argue that such defendants cannot be added until after certification. Nor does Carlson v. Independent School Dist. No. 623, 392 N.W.2d 216 (Minn. 1986) provide the support claimed by the Couch Relators as its statements in connection with class action tolling were dicta. Carlson involved, among other things, the decision of the Minnesota Court of Appeals that a 6 month to file requirement regarding state law based discrimination claims was procedural and therefore subject to tolling and that the commencement of class action claims under the discrimination law had tolled that statute of limitations as to all members of a defendant class. Id. at 220. The Minnesota Supreme Court reversed the finding that the file within 6-month rule was procedural and instead found it to be jurisdictional and, therefore, cannot be tolled. Id. at 222. Thus, the later discussion by the Minnesota Supreme Court of the tolling issue and its comments that to have tolling of a defendant class, each putative class member must have notice, on which the Relator in Couch rely, was only dicta.

opportunity to establish that there was in fact such notice. To that end, it is again important to note that evidence of such notice is in the record because certainly Master Financial knew of the suit as it was named in the original Petition and as the agent of Relator, such notice to Master Financial is imputed to Relator.

In summary, the commencement of claims against a defendant class that includes Relator by the Bakers some two and one-half years after their loan was made tolled the limitations period as to Relator regardless of whether the statute of limitations is deemed to be 6 years, 3 years or 5 years, and regardless of when the claim against Relator is deemed to accrue. For this additional reason, Respondent properly denied Relator's motion for judgment on the pleadings based on a purported expiration of a 3-year statute of limitations. As such the Preliminary Writ should be quashed.

C. BRINGING RELATOR INTO THE SUIT ON JULY 12, 2001 RELATES BACK TO THE ORIGINAL FILING OF SUIT AGAINST DEFENDANT MASTER FINANCIAL

In May of 2000, just prior to the filing of suit, Mr. and Mrs. Baker asked Master Financial, the company that sent the Bakers their monthly bills, as well as their annual tax forms, to identify the owner of their second mortgage loan. Master Financial was required under federal law to respond to that request. 15 U.S.C. §1641(f)(2). In its May 22, 2000 reply, Master Financial states that it "bought your loan from Century Financial in 1998 and began servicing it on 2/27/98. As of this date, **we [Master Financial] still own** and service your loan." (SIO-PWP, Ex. 2, at BvCF-bak0077 (emphasis added)) This statement was untrue.

Based on this information, when the Bakers originally filed suit on June 28, 2000, they named as defendants Century Financial, the originating lender, and Master Financial. On July 12, 2001, the Bakers added Relator and other assignees pursuant to their liability for violations of the SMLA under both HOEPA (15 U.S.C. §1641(d)(1)) and § 408.233 RSMo (for charging and receiving illegal interest and fees). This was done not because the Bakers or their counsel believed that Relator owned the Bakers' loan, but on behalf of the putative class members in an overall effort to add assignees. It was not until May 2002 (notwithstanding original interrogatory answers given in January, 2001), that Master Financial, together with Relator, admitted that the Bakers' loan and the other newly added plaintiffs' loans were all owned and had been owned by Relator since February or March 1998. (Compare SIO-PWP, Ex. 8 (Interr. Nos. 6 and 8); Ex. 10 (Interr. No. 2); Ex. 11 (Interr. No. 1))

Mo. Rule 55.33(c) provides that an amendment changing the party against whom a claim is asserted relates back if, in addition to arising from the same "conduct, transaction or occurrence" the "the party to be brought in by amendment: (1) has received such notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits and (2) knew or should have know that, but for a mistake concerning the identify of the proper party, the action would have been brought against the party." Each such requirement is satisfied in this case.

First, there is no dispute that the claims asserted against Relator arise from the "conduct, transaction or occurrence" set forth in the original petition. Nor can there be any dispute that Relator had notice of the institution of the action. Master Financial, Inc.,

was the servicer for Relator and Master Trust 1998-2. As the loan servicer, Master Financial is certainly the agent of Relator.[21] Thus, notice to Master Financial is notice its

[21] An agent is someone who acts for the benefit and under the control of a principal and has the power to alter the legal relations between the principal and third parties. See, e.g., Constance v. B.B.C. Development Co., 25 S.W.3d 571, 587 (Mo.App. 2000) ("a party is acting for or is representing another by the latter's authority"); Wieland v. Ticor Title Ins. Co., 755 S.W.2d 659, 664 (Mo. App. 1998) (one authorized by another to act for its benefit in dealings with third persons); Dupuis v. FHLMC, 879 F.Supp. 139, 143 (D. Me. 1995) (entity that "serviced" note and mortgage on behalf of holder was an "agent" of the holder). A review of the Servicing Agreement between Master Financial and Relator demonstrates the breadth of Master Financial's duties and undoubtedly establishes Master Financial as the agent for Relator. For example, the Servicing Agreement provides that Master Financial shall collect loan payments, conduct collection measures (foreclosures) and can "waive, modify or vary any provision of any Home Loan or consent to the postponement of strict compliance with any such provision or in any manner grant indulgence to any Obligor if in the Servicer's reasonable determination such waiver, modification, postponement or indulgence is not materially adverse to the interests of the Securityholders . . . " (SIO-PWP, Ex. 26, at Sec. 4.01(a), (c)). Its duties also include the power to waive late fees (Sec. 4.01(c)), permit a borrower to substitute a new house as collateral (id.), file deeds of release (Sec. 4.01(d)), sell liquidated home loans (Sec. 4.02(a)), and "conserve, protect and operate" property that is has foreclosed upon. (Sec.

principal, Kline v. Board of Parks & Recreation Commissioners, 73 S.W.3d 63, 67 (Mo. App. 2002) (notice to agent acting in within scope of authority over any business over which agent has authority is deemed notice or knowledge to the principal), particularly where the suit makes it clear that the intended defendants include a defendant class of all assignees that hold Century Financial originated loans. The fact that no prejudice is caused by this relation back is clear as Master Financial (who was named from the beginning) has vigorously defended this action (and obviously from the California action referenced above and the Supplement to the Prospectus, Master Financial must indemnify, defend and repurchase these illegal Missouri loans). (SIO-PWP, Ex. 1; Ex. 5 at 5-24) Moreover, Master Financial and Relator are now and at all times have been defended by the same law firms.

Master Financial was named as a defendant class representative in its capacity as a trustee of other holders and/or assignees of the second mortgage loans and as an owner (to the extent it or its affiliates, for which it is trustee) owns second mortgage loans. (SIO-PWP, Ex 7, ¶¶ 4-6 and 39-46) Certainly by naming Relator's Servicer in the

---

4.04). Certainly this scope of authority to act on behalf of Relator establishes Master Financial as Relator's agent notwithstanding any attempt to avoid that conclusion by the statement in the Servicing Agreement that Master Financial is an "independent contractor." See Empson v Missouri Highway and Transportation Commission, 649 S.W. 2d 517, 521 (Mo. App. 1983) (characterization of party as "independent contractor" is not controlling on question of agency.

Original Petition, which Petition made it clear that the suit encompassed all entities that held Century Financial-originated Missouri loans, Relator was or should have been on notice of the plaintiffs' claims. Empson, 649 S.W.2d at 521.

Relator cites to several cases and claims that there can be no relation back where a new party is added rather than changing a party to correct the misnaming of a party. While their general statement of the law is correct, Plaintiffs' addition of Relator did cure the mistake in naming Master Financial as the holder of the Baker's loan. In light of the fact that the failure to name Relator from the outset of this case was the result of its Servicer's mistake, Relator cannot credibly claim prejudice and, correspondingly, that there is no relation back.

In sum, it is entirely proper to relate back the naming of Relator as a defendant to June 28, 2000 under the equities of Mo. Rule 55.33(c). The claim relates to the same transactions as the original petition, Relator received notice during the limitations period of the institution of the action and knew or should have known that it was an intended defendant, and it will not be prejudiced by the relation back to the original filing date. Garavaglia v. J.L. Mason of Missouri, Inc., 733 S.W.2d 53, 55 (Mo. App. ED 1987). Thus, for this additional reason the claims against Relator are timely even under a 3-year statute of limitations.

D. THE SMLA MAKES IT ILLEGAL TO HAVE "DIRECTLY OR INDIRECTLY CHARGED, CONTRACTED FOR OR RECEIVED" ANY ILLEGAL FEES AND SO THE LIMITATIONS PERIOD RUNS FROM EACH TIME A BORROWER IS CHARGED OR THE NOTE HOLDER RECEIVES THE ILLEGAL FEES AND/OR INTEREST AND RELATOR RECEIVED PAYMENT FROM THE NAMED PLAINTIFFS WITHIN THREE YEARS OF THE COMMENCEMENT OF SUIT AGAINST RELATOR

The whole question of whether there is a continuing violation under the SMLA is really the basic statute of limitations question of "when does the cause of action accrue?" Relator claims that the date of the loan is the date of accrual. Accordingly, no claim can be brought more than 6 (or 3 or 5) years after the loan is made. Such a rule, however, is inconsistent with long established Missouri law and the statutory scheme of both the SMLA, Missouri usury law and Missouri statutes of limitations in general and it is also inconsistent with Congress' intent under HOEPA to make assignees liable for the sins of the originating lender. Nor does a "date of the loan" accrual rule adequately address the realities of mortgage lending transactions. These obligations continue for decades and the notes are often sold numerous times. Accordingly, a potentially liable party under the SMLA (one who directly or indirectly charges, contract for or receives illegal fees) may not come into the picture until years after the loan is made. For these reasons, the proper accrual rule is that each payment is a continuing violation of the SMLA; that is, the

proper date of accrual is the date on which the last payment was made. As such, each Plaintiffs' loan was timely, even under a 3-year statute of limitations.[22]

First, the SMLA's own provision support finding that each payment represents a continuing violation. Under the SMLA any person who directly or indirectly charges, contract for or receives any illegal closing costs and fees is liable under the Act. § 408.233.1 RSMo. Thus, for the purpose of determining the statute of limitations, deeming that a SMLA claim accrues at the time the loan was made only makes sense, if at all, in regard to the originating lender as that lender is known when the loan is made. Such an accrual date is wholly inapplicable to downstream assignees, like Relator, who only subsequent to the making of the loan even come into the picture. In this case, for example, the Bakers' loan was made on November 24, 1997 but it was not until March 12, 1998 that Relator acquired their loan and began receiving the payments thereunder. Certainly it is possible that a loan subject to the SMLA would be sold more than 6 years (or 3 years) after it was made and yet under the accrual theory Relator advances, that subsequent assignee would be immune from liability despite receiving a portion of the illegal fees and interest each time a payment is made. The Missouri legislature recognized the transferability of such loans by putting in the "charges, contracts for or

22

Plaintiff	Loan Date	Last Payment	Date Plaintiff Added	Date Relators Added
James &Jill Baker	11/24/97	01/01	06/28/00	07/12/01
Jeffrey & Michelle Cox	09/30/97	Current	03/11/02	07/12/01
William & Linda Springer	10/08/97	Current	03/11/02	07/12/01

receives" language and such plain intent would be thwarted by application of a rigid, "loan date" based accrual date.

It should also be noted that a loan date accrual could make it impossible for the borrower to even determine in some case who to timely sue. The actual holders of these loans are difficult to find. A typical loan has been sold several times and sits in some trust that the borrower knows nothing about. We could spend pages talking about how difficult it has been for us, as lawyers, to even figure out who these holders are. A loan date accrual coupled with a three year statute of limitations will effectively mean that the ultimate holders of these loans, the persons HOEPA says should police the industry, might not be timely discovered and sued.

Importantly, the idea of a continuing violation is well established under Missouri law. See Johnson Development Co. v. First National Bank of St. Louis, 999 S.W.2d 314, 317 (Mo. App. E.D. 1999) (one year limitations period for making claim to bank for forged check ran from each time customer gets a new statement of account from which a forgery can be determined); Davis v. Laclede Gas Co., 603 S.W.2d 554, 556 (Mo. banc 1980)("If . . . the wrong may be said to continue from day to day, and to create a fresh injury from day to day, and the wrong is capable of being terminated, a right of action exists for the damages suffered within the statutory period immediately preceding suit."); see also Smith v. Smith Barney Harris Upham & Co. Inc., 505 F.Supp 1380 (W.D. Mo. 1981); Bulke v. Central Missouri Electric Cooperative, 966 S.W.2d 15 (Mo. App. W.D. 1998).

Further, in the context of the issue of whether a cause of action arising from a written obligation to pay money runs from the date the documents are executed or from payment, Missouri's usury laws are particularly instructive. Such laws firmly establish the concept that the cause of action runs from payment (which of course is the counterpart to the term "receive" in the SMLA). See e.g. § 408.030.2 R.S.Mo. (claim for payment of interest "greater than permitted by law" must be "brought within five years from the time when said interest should have been paid"); § 408.052.4 (providing that a claim based on the charging of points or fees beyond that allowed by § 408.052 must be "brought within five yeas of such payment"); see also Addison v. Jester, 758 S.W.2d 454, 457-59 (Mo. App. WD 1988) (usury claim under § 408.030.2 covers only interest actually paid); § 408.060 (allowing defense of usury to any claim provided the amount upon proof that the usurious amount was actually paid). Plainly, these statutes and case law interpreting them make clear that Missouri recognizes that a cause of action relating to contracts for the payment of money accrue as of payment.

The result should be no different here in connection with claims that stem from the overcharging of origination fees or the charging of prohibited closing costs in connection with a loan. There is also an interest overcharge aspect to these SMLA claims. Specifically, an express remedy under the SMLA is that a violation means that the lender is barred from the collection of any interest on the loan. § 408.236 R.S.Mo. Thus, by continuing to collect interest on these loans despite the fact that they violate the SMLA a further violation occurs each month. This fact furthers the idea that the accrual of usury claims should likewise guide the determination of when a SMLA claim accrues.

It is significant also that Missouri's own general statute of limitations provision recognizes the idea of a continuing violation:

> [F]or the purposes of section 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, **but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item**, so that all resulting damage may be recovered, and full and complete relief obtained.

§ 516.100 RSMo (emphasis added).

Relator may complain that a last payment accrual date is inequitable as a claim could remain viable for decades. Such a potential result is no different, however, then the 10 year statute of limitations currently available to a lender to collect on a debt. See § 516.110 RSMo. For example, the lender on a 30 year note could some 10 years after a missed payment in year 28 sue to recover that payment thus making the borrower subject to suit some 38 years after the loan was made.

In opposition to recognition of a continuing violation in this matter, Relator points to decisions from other jurisdictions (Federal District Courts in Maryland and North Carolina (two cases, same judge)) in which a continuing violation argument was rejected in cases involving claims for charges made in connection with second mortgage loans. Miller v. Pacific Shore Funding , 224 F.Supp. 2d 977, 989-90 (D. Md. 2002); Faircloth v. National Home Loan Corp., 2003 WL 1232825 at *5-6 (M.D.N.C., March 17, 2003); Dash v. FirstPlus Home Loan Trust 1996-2, 2003 WL 103855 at n. 12. On the other

hand, Federal District Courts considering the same issue have adopted the continuing violation theory in a second mortgage class action lawsuit. See Williams v. Zed Corporation (f/k/a) DiTech Funding Corporation et al., Case No. 02-2045 GV (W.D. Tenn., August 15, 2002) (A227-251) Williams involved class action claims against second mortgage loan originators and various assignees that held the class members' loans. (A227-228) The asserted class action claims included Tennessee state law claims for excessive loan fees. (A228) The defendants contended that such claims were barred by a statute of limitations requiring that claims be brought within three years from "the date of payment of the charges, fees or commissions." (A250) In rejecting the contention that the claims were time barred the court adopted a continuing violation theory holding as follows:

> Since the fees charged were included in the amount of principal to be repaid over the course of the mortgage, the date of payment of the charges has not occurred until the mortgage is satisfied in full. Since plaintiffs continue to pay the mortgage on a monthly basis, section 47-14-118(b) [statute of limitations] cannot bar their claim for excessive charges.

(A250)

Respondent believes the Williams matter to be the more reasoned decision and should guide this Court particularly in light of the fact that Missouri has long recognized the idea of a continuing violation and has expressly through its statutes deemed that the time of a payment will control the accrual of causes of action arising from obligations to pay money.

For the above reasons, the Court should hold that the Plaintiffs' claims accrue as of the last payment made on the illegal loan and therefore the Plaintiffs' claims are timely under a 6 or 3-year statute. Such a finding at to the accrual date is the only decision that ensures fulfillment of the intent of the Missouri legislature that any person who ever "receives" charges that exceed the SMLA could be held liable. Such a ruling likewise promotes the intent of Congress under HOEPA that assignees stand in the shoes of the originating lender.

III.

IN THE ABSENCE OF § 516.420, THE PROPER STATUTE OF LIMITATIONS WOULD NOT BE THE 3-YEAR PERIOD UNDER § 516.130 BUT THE FIVE-YEAR PERIOD UNDER § 516.120(2) BECAUSE IF THE REMEDIES AVAILABLE UNDER THE SMLA ARE NOT A PENALTIES OR FORFEITURES BUT ARE REMEDIAL, AS RELATOR HAS CONTENDED, THEN THE STATUTE IS REMEDIAL AND § 516.120(2) APPLIES

If Plaintiffs' claims under the MSMLA and § 408.562 are penal, as the Relator contends, then § 516.400 RSMo and § 516.420 RSMo apply and the 6-year statute contained in the latter statute governs the claims of the plaintiffs and the Class. Relator, however, has also argued that the plaintiffs' claims are more remedial than penal. (Relator's Brief at 21 n.3) Relators cannot have it both ways and if the Court would deem the SMLA to be remedial in nature, then the Court must conclude that the applicable statute of limitations is Missouri's 5-year statute, § 516.120(2) RSMo. Section 516.120 provides in pertinent part:

"Within five years:

(1) All actions upon contracts, obligations or liabilities, express or implied

* * *

(2) An action upon a liability created by a statute other than a penalty or forfeiture; * * *"

(Emphasis added). Cf. 34 Mo. Prac. Personal Injury and Tort Handbook § 29.5 (2002 ed.). ("A private [right of] action for damages under [the Missouri Merchandising Practices Act] is an action on a liability created by a statue, so that the five-year general statue of limitations for actions on contracts, obligations and liabilities, V.A.M.S. § 516.120(2), likely applies"). Notably, statues under Missouri's usury laws, which exact damages not unlike the SMLA, see e.g. § 408.030 (twice the interest paid plus costs and attorneys fees); § 408.052 (the return of excessive loan fees or if not returned on demand twice the amount of fees plus costs and attorney fees), and which rest also in Chapter 408 of the Missouri statutes, are deemed to be remedial. State ex rel Crist v. Nationwide Finance Corporation of Missouri, 588 S.W.2d 8, 11 (Mo. App. 1979) (usury statutes are "remedial in nature"); accord Garrett v. Citizens Savings Association, 636 S.W.2d 104, 108 (Mo. App. 1982).

Application of the 5-year statute of limitations is also consistent with the general statute of limitations law that when a statute does not expressly provide a limitations period courts will generally apply the most analogous limitations period. Woody v. State Farm Fire & Casualty Company, 965 F. Supp. 691, 693 (E.D. Pa. 1997); Johnson & Higgins of Texas v. Kenneco Energy, Inc., 962 S.W.2d 507, 518 (Tex. 1998). In this

case, that the most analogous period would be those statutes under Chapter 408, which of course is the statutory framework within which the SMLA resides, that call for a 5-year limitations period running from payment. See e.g. § 408.030.2 RSMo. (claim for payment of interest "greater than permitted by law" must be "brought within five years from the time when said interest should have been paid"); § 408.052.4 (providing that a claim based on the charging of points or fees beyond that allowed by § 408.052 must be "brought within five yeas of such payment") .

For these reasons, should the Court believe that § 516.420 does not govern the SMLA claims, given the remedial nature of the relief sought, then the Court should decide whether the proper statute of limitations is the 5-year statute in § 516.120(2) RSMo as opposed to the 3-year statute in § 516.130(2) RSMo. The application of the 5-year statute would be appropriate if the Court determines the plaintiffs' claims under the Missouri Second Mortgage Loans Act and § 408.562 RSMo are not governed by § 516.420, but do constitute an action to enforce a statutory liability "other than a penalty or forfeiture."

CONCLUSION

The Court should quash its preliminary order of prohibition and, like Respondent, hold that the claims under the Missouri Second Mortgage Loans Act and § 408.562 RSMo 2000 that the named plaintiffs are asserting against Century Financial and its assignees, including Relators, are governed by the 6-year statute of limitations set out in § 516.420 RSMo 2000.

Dated: May 2, 2003

Respectfully submitted,

WALTERS BENDER STROHBEHN
& VAUGHAN, P.C.

By_____

J. Michael Vaughan Mo. Bar #24989
Kip D. Richards Mo. Bar #39743
David M. Skeens Mo. Bar #35728
2500 City Center Square
12th & Baltimore
P.O. Box 26188
Kansas City, MO 64196
(816) 421-6620
(816) 421-4747 (Facsimile)

and

Maurice Graham Mo. Bar #18029
GRAY, RITTER & GRAHAM, P.C.
701 Market, Suite 800
St. Louis, MO 63101
(314) 241-5620
(314) 241-4140 (fax)

ATTORNEYS FOR RESPONDENT

RULE 84.06(C) CERTIFICATION

The undersigned certifies that the foregoing brief complies with the limitations of Rule 84.06(b), that the brief contains 24,944 words, including footnotes, and that a genuine copy of the brief, together with a copy of the appendix and a floppy disk containing the same, was this 2nd day of May 2003

hand-delivered to:

Scott Martin
HUSCH & EPPENBERBER, L.L.C.
1200 Main Street, Suite 1700
Kansas City, Missouri 64105
816.421.0596 (fax #)
Attorneys for Relator and Defendants Master Financial, Inc.

mailed by United States mail, first-class postage prepaid, to:

Mark A. Olthoff
SHUGHART THOMPSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
816.374.0509 (fax #)
Attorneys for Defendant Wilmington Trust Company

David Sturgeon-Garcia
Lynn A. Miller
Buchalter, Nemer, Fields &
Younger
333 Market Street, 29th Floor
San Francisco, CA 94105-2130
Co-Counsel for Relator and Defendants Master Financial, Inc.
Honorable David W. Russell
CIRCUIT COURT OF CLAY COUNTY MISSOURI
11 S. Water
Liberty, MO 64068

_____

RULE 84.06(g) CERTIFICATION

The undersigned certifies that each floppy disk filed with the Court and/or served on the parties pursuant to Rule 84.06(g) were scanned for viruses and that each was virus-free.

_____